A

MENTA CONSTRUCTION SDN BHD v. LESTARI PUCHONG SDN BHD

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZAINUN ALI FCJ
B JEFFREY TAN FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02-72-09-2014]
8 OCTOBER 2015

C

CONTRACT: *Rectification – Mutual/common mistake – Whether rectification should be allowed – Elements to be established – Test under s. 30 to 32 of Specific Relief Act 1950 – Whether objective or subjective test – Whether antecedent agreement between same parties to be considered in determining true intention of*
D *parties – Whether carelessness of complaining party a bar to rectification if impugned clause did not accord with true agreement between parties – Specific Relief Act 1950, ss. 30 & 32*

The respondent was a company in the Talam Group of Companies ('Talam'). Between April 1997 and September 2004, the appellant, a construction
E company, undertook construction and related works ('the said works') for Talam who could not pay for the said works to the value of RM57,425,697.82 that was due and payable to the appellant. By a 'Global Settlement Agreement' ('GSA'), the appellant agreed to accept, and Talam agreed to pay RM56 million, in cash and kind, to the appellant, in full and
F final settlement of all dues. Pursuant to the GSA, Talam agreed to pay RM20 million and to transfer three lots of lands, namely Lots 50603, 50608 and 50609 with an agreed combined value of RM36 million, to the appellant. Concurrently, the appellant entered into three sale and purchase agreements ('SPAs') to 'purchase' those three lots from the respondent and Expand
G Factor Sdn Bhd, another company in Talam, for RM36 million. At the time of execution of the SPAs, two charges were registered against the respondent's Lot 50603, in favour of Pengurusan Danaharta Nasional Bhd ('Danaharta') and Malayan Banking Bhd ('MBB'). The respondent claimed under cl. 2.2 of the SPAs, the appellant had to pay the redemption sum of
H RM7 million to redeem Lot 50603 from Danaharta. The appellant contended that cl. 2.2 of the SPA, which provided for the appellant to redeem Lot 50603, was a mistake which did not embody the parties' intention when they executed the agreements, and that Lot 50603 should be transferred to the appellant at Talam's cost and expense. Hence, the appellant applied to have cl. 2.2 rectified, by its removal from the SPA. The trial court
I held that cl. 2.2 was not a mistake, in view of the oral evidence and the

preamble to the SPA which stated that Lot 50603 was charged to Danaharta and MBB. The Court of Appeal dismissed the appellant's appeal. Leave was granted to the appellant to appeal to the Federal Court on the following questions of law: (i) when a written contract was sought to be rectified on the ground of mutual mistake, whether the test under s. 30 to s. 32 of the Specific Relief Act 1950 ('the Act') under principles of rectification was the objective test to ascertain the intention of parties and not the subjective denial of the defendant; (ii) whether the existence of an antecedent agreement between the same parties should be considered the most reliable basis of determining the true intention of the parties in executing the impugned agreement; and (iii) whether the fact that the parties had willingly executed the impugned agreement or that the complaining party was careless in doing so was a bar to rectification if the impugned clause did not accord with the true agreement between the parties.

Held (allowing appeal)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) Pursuant to s. 30 of the Act, the court must ascertain the real intention of the parties in executing the instrument. Only if the instrument does not truly express their intention, may a party institute a suit to have the instrument rectified. The Act does not say that a plaintiff must show a binding antecedent agreement. (para 59)

(2) The misdirection by the courts below in the construction of cl. 2.2 was to ignore and gave no effect to the other provisions of the SPA. There was a conflict between cl. 2.2 which provided for the appellant to redeem Lot 50603, and cls. 6.2, 6.12, 6.16 and 9 which provided that Lot 50603 was 'of leasehold tenure and free of all claims, liens, charges, mortgages, equities, restrictions-in-interest and any other encumbrances whatsoever'. There was no good reason to prefer cl. 2.2 over cls. 6.2, 6.12 and 6.16. (para 73)

(3) The key was cl. 7 of the SPA which provided that 'the vendor hereby agrees to sell and the purchaser agrees to purchase the property on the basis of cl. 2.3 of the GSA'. Accordingly, the SPA had to be read in conjunction with the GSA. Clause 2.3.1 of the GSA clearly provided that the respondent shall 'effect the conveyance and transfer' the said land 'free from encumbrances whatsoever … without any payment whatsoever to made by the (appellant)'. When construed together, the purport and effect of the GSA and SPA could not be any clearer. Lot 50603 to be transferred should be free of all encumbrances. Consequently, the construction of the courts below could not be supported. (para 73)

(4) The real intention of the parties was to settle the debt of RM56 million. That the debt was to be settled by a cash payment and by the transfer of three properties was the term on the mode of payment which should settle the debt of RM56 million. But if the appellant had to redeem the Danaharta charge by payment of RM7 million to Danaharta, that would mean that the appellant would surely not be paid the full debt of RM56 million, which would not be in accord with the antecedent agreement or the continuing common intention of the parties when they executed the SPA. Therefore, cl. 2.2 could not have expressed the real intention of the parties. Clause 2.2 was clearly a mistake. (para 74)

(5) Lack of care on the part of the plaintiff was no bar to rectification. The argument that the mistake was only raised after two years had passed from the date of execution of the SPA, could not influence the result. The appellant had moved with all due expedition when it became aware of the departure between the SPA and the GSA, such that there was no delay upon which reliance could be placed in connection with any defence of laches. (para 75)

(6) When a written agreement is sought to be rectified, the court adopts the objective approach to ascertain the real intention of the parties. An antecedent agreement is the best evidence of the real intention of the parties. The continuing common intention is the next best evidence of the real intention of the parties. For rectification of an instrument, the plaintiff must show that the instrument does not truly express the real intention of the parties. The plaintiff must also show that the instrument does not truly express the antecedent agreement or continuing common intention up to the point of execution of the formal instrument. (para 76)

(7) There can be no rectification if the plaintiff cannot show the real intention of the parties. Evidence of what took place prior to execution of the instrument is admissible and indeed essential to prove what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain. 'Some outward expression of accord" is evidence of "continuing common intention'. Evidence of subjective intention is relevant to ascertain the real intention of the parties. But the subjective intention as well as a subjective denial must be evaluated under the light of the intercommunication or that which had 'crossed the line'. (para 76)

(8) If the court finds it clearly proved that there has been fraud or mutual mistake in framing the instrument, and has ascertained the real intention of the parties in executing the instrument, the court may in its discretion rectify the instrument so as to express that real intention, so far as this can be done without prejudice to the rights acquired by third parties in good faith and for value. (para 76)

(9) In rectifying an instrument, the court is not confined to an enquiry on the construction of the instrument. On both construction and rectification, the appellant should succeed. The court rectified the pertinent SPA by erasing cl. 2.2 from the SPA. (para 77)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah sebuah syarikat dalam Kumpulan Syarikat Talam ('Talam'). Antara bulan April 1997 dan September 2004, perayu, sebuah syarikat pembinaan, telah melaksanakan pembinaan dan kerja-kerja berkaitan untuk Talam yang tidak dapat menanggung kos untuk kerja-kerja tersebut yang bernilai RM57,425,697.82 yang harus dan wajar dibayar kepada perayu. Berdasarkan 'Global Settlement Agreement' ('GSA') perayu bersetuju untuk menerima dan Talam bersetuju untuk membayar RM56 juta wang tunai dan barangan kepada perayu sebagai penyelesaian penuh dan muktamad segala hutangnya. Mengikut GSA tersebut, Talam bersetuju untuk membayar RM20 juta dan untuk memindahkan tiga lot tanah iaitu Lot 50603, 50608 dan 50609 dengan nilai gabungan yang dipersetujui iaitu RM36 juta kepada perayu. Pada masa yang sama, perayu memasuki tiga perjanjian jual beli ('PJB') untuk 'membeli' tiga lot tersebut daripada responden dan Expand Factor Sdn Bhd, syarikat lain di Talam pada harga RM36 juta. Pada masa pemeteraian PJB, dua gadaian telah didaftarkan terhadap Lot 50603 responden yang memihak kepada Pengurusan Danaharta Nasional Bhd ('Danaharta') dan Malayan Banking Bhd ('MBB'). Responden menuntut di bawah kl. 2.2 PJB, bahawa perayu terpaksa membayar jumlah penebusan sebanyak RM7 juta untuk menebus Lot 50603 daripada Danaharta. Perayu menghujahkan bahawa kl. 2.2 PJB, yang memperuntukkan bahawa perayu yang perlu menebus Lot 50603 adalah satu kesilapan yang tidak mencerminkan niat pihak-pihak berkenaan apabila mereka memeterai perjanjian-perjanjian tersebut dan bahawa Lot 50603 perlu dipindahkan kepada perayu atas kos dan pembelanjaan Talam. Justeru, perayu telah membuat permohonan supaya kl. 2.2 diperbetulkan dengan mengeluarkannya dari PJB. Mahkamah perbicaraan memutuskan bahawa kl. 2.2 bukan satu kesilapan, memandangkan keterangan lisan dan mukadimah kepada PJB yang menyatakan bahawa Lot 50603 telah digadaikan kepada Danaharta dan MBB. Mahkamah Rayuan telah menolak rayuan perayu. Kebenaran telah diberikan kepada perayu untuk merayu kepada Mahkamah Persekutuan atas persoalan undang-undang berikut: (i) apabila suatu kontrak bertulis dipohon untuk diperbetulkan atas alasan kesilapan bersama, sama ada ujian di bawah s. 30 hingga s. 32 Akta Relif Spesifik 1950 ('Akta') di bawah prinsip-prinsip pembetulan adalah ujian objektif untuk memastikan niat pihak-pihak berkenaan dan bukan penafian subjektif defendan; (ii) sama ada kewujudan perjanjian terdahulu antara pihak-pihak yang sama boleh dianggap sebagai asas yang paling boleh dipercayai untuk menentukan niat sebenar pihak-pihak dalam memeterai

perjanjian yang dipersoalkan; dan (iii) sama ada fakta bahawa pihak-pihak berkenaan telah dengan rela melaksanakan perjanjian yang dipersoalkan atau bahawa pihak yang mengadu telah cuai dalam melakukannya sehingga menghalang pembetulan jika klausa yang dipersoalkan tidak selaras dengan perjanjian sebenar antara pihak-pihak berkenaan.

Diputuskan (membenarkan rayuan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Menurut s. 30 Akta, mahkamah perlu menentukan niat sebenar pihak-pihak dalam memeterai surat cara tersebut. Hanya jika surat cara tersebut benar-benar tidak mencerminkan niat mereka, maka pihak yang memulakan tindakan boleh memperbetulkan surat cara tersebut. Akta ini tidak menyatakan bahawa plaintif mesti menunjukkan perjanjian terdahulu yang mengikat.

(2) Salah arah oleh mahkamah-mahkamah di bawah dalam mentafsir kl. 2.2 adalah pengabaian dan tidak memberi kesan kepada peruntukan-peruntukan lain dalam PJB. Terdapat konflik antara kl. 2.2 yang memperuntukkan perayu menebus Lot 50603 dan kl. 6.2, 6.12, 6.16 dan 9 yang memperuntukkan bahawa Lot 50603 adalah 'of leasehold tenure and free of all claims, liens, charges, mortgages, equities, restrictions-in-interest and any other encumbrances whatsoever'. Tiada alasan yang baik untuk memilih kl. 2.2 berbanding kl. 6.2, 6.12 dan 6.16.

(3) Klausa utama adalah kl. 7 PJB yang memperuntukkan bahawa 'the vendor hereby agrees to sell and the purchaser agrees to purchase the property on the basis of clause 2.3 of the GSA'. Dengan itu, PJB tersebut harus dibaca bersama-sama dengan GSA. Klausa 2.3.1 GSA dengan jelas memperuntukkan bahawa responden harus 'effect the conveyance and transfer' tanah tersebut 'free from encumbrances whatsoever… without any payment whatsoever to made by the (appellant)'. Apabila ditafsirkan bersama, tujuan dan kesan GSA dan PJB adalah amat jelas. Lot 50603 yang akan dipindahkan hendaklah bebas daripada segala halangan. Oleh itu, tafsiran mahkamah-mahkamah di bawah tidak boleh disokong.

(4) Niat sebenar pihak-pihak adalah untuk menyelesaikan hutang RM56 juta. Hutang tersebut perlu diselesaikan melalui pembayaran tunai dan pindah milik tiga harta adalah terma cara pembayaran yang sepatutnya menyelesaikan hutang RM56 juta tersebut. Namun jika perayu terpaksa menebus gadaian Danaharta dengan pembayaran RM7 juta kepada Danaharta, ini bermakna perayu sudah tentu tidak akan dibayar hutang penuh RM56 juta, yang tidak sejajar dengan perjanjian terdahulu atau

niat bersama yang berterusan pihak-pihak berkenaan apabila mereka memeterai PJB. Maka, kl. 2.2 tidak mungkin menyatakan niat sebenar pihak-pihak berkenaan. Klausa 2.2 jelas merupakan satu kesilapan.

(5) Pengurusan plaintif yang tidak cekap bukan halangan untuk pembetulan. Hujahan bahawa kesilapan hanya dibangkitkan selepas dua tahun berlalu dari tarikh pemeteraian PJB tidak boleh mempengaruhi keputusan tersebut. Perayu telah bertindak dengan cepat apabila menyedari penyimpangan antara PJB dan GSA sehingga tiada kelewatan di mana pergantungan boleh diletakkan berkaitan sebarang pembelaan kelewatan.

(6) Apabila suatu perjanjian bertulis dipohon untuk diperbetulkan, mahkamah akan mengambil pendekatan objektif dalam menentukan niat sebenar pihak-pihak berkenaan. Perjanjian terdahulu adalah keterangan terbaik mengenai niat sebenar pihak-pihak berkenaan. Niat bersama berterusan adalah keterangan terbaik mengenai niat sebenar pihak-pihak. Bagi pembetulan surat cara, plaintif harus menunjukkan bahawa surat cara tersebut tidak menggambarkan niat sebenar pihak-pihak berkenaan. Plaintif juga harus menunjukkan bahawa surat cara tersebut tidak menggambarkan perjanjian terdahulu atau niat bersama berterusan sehingga pemeteraian surat cara yang formal.

(7) Pembetulan tidak boleh dibuat jika plaintif gagal menunjukkan niat sebenar pihak-pihak berkenaan. Keterangan tentang apa yang berlaku sebelum pemeteraian surat cara adalah boleh diterima dan sememangnya penting untuk membuktikan niat yang disampaikan oleh satu pihak kepada pihak lain, dan dengan niat dan perjanjian bersama apa tawaran mereka dibuat. 'Some outward expression of accord' adalah keterangan bagi 'continuing common intention'. Keterangan niat subjektif adalah relevan untuk menentukan niat sebenar pihak-pihak berkenaan. Tetapi niat subjektif serta penafian subjektif mesti dinilai di bawah perhubungan dua hala atau apa yang telah 'crossed the line'.

(8) Jika mahkamah mendapati bahawa ia telah dibuktikan dengan jelas bahawa terdapat penipuan atau kesilapan bersama dalam merangka surat cara tersebut dan telah menentukan niat sebenar pihak-pihak berkenaan dalam memeterai surat cara, mahkamah boleh atas budi bicaranya memperbetulkan surat cara untuk menggambarkan niat sebenar tersebut setakat mana boleh dilakukan tanpa menjejaskan hak pihak ketiga dengan niat baik dan untuk nilai.

(9) Dalam memperbetulkan surat cara, mahkamah tidak dihadkan kepada siasatan ke atas tafsiran surat cara tersebut. Atas tafsiran dan pembetulan, perayu sepatutnya berjaya. Mahkamah memperbetulkan PJB berkenaan dengan memadamkan kl. 2.2 daripada PJB.

Case(s) referred to:

A Roberts & Co, Ltd v. Leicestershire County Council [1961] 2 WLR 1000 ***(refd)***
Amp (UK) Plc & anor v. Barker [2000] EWHC Ch 42 ***(refd)***
Arnold v. Britton [2015] UKSC 36 ***(refd)***
Australasian Performing Right Association Ltd v. Austrama Television Pty Ltd [1972] 2 NSWLR 467 ***(refd)***
Cambridge Antibody Technology Ltd v. Abbott Biotechnology Ltd and another [2004] EWHC 2974 ***(refd)***
Cameron v. M & W Mack (ESOP) Trustee Ltd [2001] All ER (D) 112 (Nov) ***(refd)***
Chartbrook Ltd v. Persimmons Homes Ltd (2009) 4 All ER 677 ***(refd)***
Chee Lui Teen v. Kiet Hoe Development Sdn Bhd [1987] 1 LNS 132 HC ***(refd)***
Chester Chai Chung Ching & Ors v. Diversey (Far East) Pte Ltd [1991] 3 CLJ 2632; [1991] 4 (Rep) 737 HC ***(refd)***
Commission for the New Towns v. Cooper (Great Britain) Ltd [1995] Ch 259 ***(refd)***
Crane v. Hegeman-Harris Co Inc [1939] 1 All ER 662 ***(refd)***
Damco Nominees Pty Ltd v. Moxham [2012] VSC 79 ***(refd)***
Daventry District Council v. Daventry & District Housing Ltd [2011] EWCA Civ 1153 ***(refd)***
Dundee Farm Ltd v. Bambury Holdings Ltd [1978] 1 NZLR 647 ***(refd)***
Earl v. Hector Whaling Ltd [1961] 1 Lloyd's Rep 459 ***(refd)***
Establissements Georges et Paul Levy v. Adderley Navigation Co Panama SA (The Olympic Pride) [1980] 2 Lloyds's Rep 67 ***(refd)***
Ex Parte Dawes, In re Moon (1886) 17 QBD 275 ***(refd)***
Fletcher Challenge Energy Ltd v. Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433 ***(refd)***
Foo Lian Sin & Anor v. Ng Chun Lin & Anor [2004] 4 CLJ 220 CA ***(refd)***
Frederick E Rose Ltd v. WM H PIM Ltd (1953) 2 All ER 739 ***(refd)***
Frederick E Rose (London) Ltd v. William H Pim Jnr & Co Ltd [1953] 2 QB 450 ***(refd)***
Gallaher Limited v. Gallaher Pensions Limited and Others [2005] EWHC 42 (Ch) ***(refd)***
Garrard v. Frankel (1862) 30 Beav 445 ***(refd)***
Haji Abdul Rahman Allarakhia & anor v. The Bombay and Persia Steam Navigation Company 16 ILR 561 ***(refd)***
Harper v. Interchange Group Ltd [2007] All ER (D) 169 (Aug) ***(refd)***
HFI Farnborough LLP and others v. Park Garage Group plc [2012] EWHC 3577 (Ch) ***(refd)***
Inland Revenue Commissioners v. Raphael [1935] AC 96 ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***
Joscelyne v. Nissen [1970] 1 All ER 1213 ***(refd)***
Littman v. Aspen Oil [2005] EWCA Civ 1579 ***(refd)***
Lovell & Christmas Ltd v. Wall [1911] 104 LT 85 ***(refd)***
Lovell & Christmas v. Wall, Faraday v. Tamworth Union (1916) 86 LJ Ch 436 ***(refd)***
Mackenzie v. Coulson (1869) LR 8 Eq 368 ***(refd)***
Marley v. Rawlings & Anor [2014] UKSC 51 ***(refd)***
Marx Universal Development Group Pte Ltd v. Shen Yixuan [2009] SGHC 164 ***(refd)***
May v. Platt [1900] 1 Ch 616 ***(refd)***
Mohamed Bashir v. Mohammad Safraz Ali & Anor (2010) EWHC 2320 (Ch) ***(refd)***
Munt v. Beasley [2006] EWCA Civ 370 ***(refd)***
Natarajan Asari v. Pichamuthu Asari AIR 1972 Madras 192 ***(refd)***

Ng Chun Lin & Anor v. Foo Lian Sin & Anor [2000] 6 CLJ 133 HC ***(refd)***
NSW Medical Union Ltd v. Transport Industries Insurance Co Ltd (1986) 6 NSWLR 740 ***(refd)***
Oh Hiam & Ors v. Tham Kong [1966] 1 LNS 121 HC ***(refd)***
Oh Hiam & Ors v. Tham Kong [1980] 1 LNS 53 PC ***(refd)***
Pender Development Pte Ltd v. Chesney Real Estate Group LLP [2009] 3 SLR (R) 1063 ***(refd)***
Prenn v. Simmonds [1971] 1 WLR 1381 ***(refd)***
Ryledar Pty Ltd v. Euphoric Pty Ltd [2007] 69 NSWLR 603 ***(refd)***
Schofield v. WC Clough & Co [1913] 2 KB 103 ***(refd)***
Shipley Urban District Council v. Bradford Corporation [1936] Ch 375 ***(refd)***
Solarus Projects Pty Ltd v. Vero Insurance Ltd [2013] NSWSC 328 ***(refd)***
Southwind Development Sdn Bhd v. Hass Pl [1995] 1 LNS 225 ***(refd)***
Swainland Builders Ltd v. Freehold Properties Ltd [2002] 2 EGLR 71; [2005] EWCA AIR 560 ***(refd)***
Syed Yacob v. Syed Alwee & Ors [1990] 1 LNS 163 HC ***(refd)***
Tartsinis v. Navona Management Company [2015] EWHC 57 (Comm) ***(refd)***
Tham Kong v. Oh Hiam & Ors [1967] 1 LNS 193 FC ***(refd)***
Thomas Bates & Son Ltd v. Wyndham's (Lingerie) Ltd [1981] 1 All ER 1077 ***(refd)***
United States of America v. Motor Trucks Ltd [1924] AC 196 ***(refd)***
W Higgins Ltd v. Northampton Corporation [1927] 1 Ch 128 ***(refd)***
Weeds v. Blaney [1978] 2 EGLR 84 ***(refd)***
Westland Savings Bank v. Hancock [1987] 2 NZLR 21 ***(refd)***
Yap Phooi Yin & anor v. CM Boyd [1981] 1 LNS 144 FC ***(refd)***
Yuson Bien & Anor v. Bankers Trust Co Ltd [1979] 1 LNS 131 FC ***(refd)***

Legislation referred to:
Contract Act 1950, ss. 21, 30
Specific Relief Act 1950, ss. 30, 31, 32, 33

Other source(s) referred to:
Andrew Phang Boon Leong, *The Law of Contract in Singapore*, para 10.261
Cheshire, Fifoot & Furmston's Law of Contract, 294 note 6
Cheshire & Fifoot Law of Contract, 10th Australian edn, para 12.33
Chitty on Contracts, 30th edn, vol I, 5-114
Chitty on Contracts, 31st edn, p 554
David Hodge, *Rectification - The Modern Law and Practice Governing Claims for Rectification for Mistakes*, para 2-20
Gerard McMeel, *Construction of Contracts, Interpretation, Implication, and Rectification*, 2nd edn, paras 17.01, 17.02-17.03, 17.11-17.12, 17.37, 17.42, 17.46, 17.52, 17.53, 17.54
Leonard Bromley QC, *Rectification in Equity,* (1971) 87 LQR 532
Pollock & Mulla, Indian Contract and Specific Relief Act, 12th edn, vol II, p 2627
Rectifying the course of rectification, (2012) 75(3) MLR 412
Sir Richard Buxton's, *Construction and Rectification after Chartbrook,* 69 [2010] CLJ 253
Snell's Equity, 32nd edn, paras 16-001, 16-013, 16-015, 16-018, 16-019
Spry – Equitable Remedies, 9th edn, pp 630, 634, 635
Treitel, *The Law of Contract*, 13th edn, 8-067
Words and Phrases Legally Defined, 3rd edn, vol 4, p 33

For the appellant - Cyrus Das (C Sri Kumar & Jaqdesh Singh with him); M/s Kumar Partnership
For the respondent - Chin Tzi Song (K Chandrasekar & Emmy Hazwani Jamil with him); M/s Arifin & Partners

Reported by Amutha Suppayah

JUDGMENT

Jeffrey Tan FCJ:

[1] The action, to have cl. 2.2 of the sale and purchase agreement dated 29 July 2005 rectified, was dismissed. Leave was granted to the appellant/plaintiff to appeal against the concurrent findings of the trial court and the Court of Appeal on the following questions of law:

(a) When a written contract is sought to be rectified on the ground of mutual mistake, whether the test under ss. 30 to 32 of the Specific Relief Act 1950 under principles of rectification is the objective test to ascertain intention of parties and not the subjective denial of the defendant.

(b) Whether the existence of an antecedent agreement between the same parties should be considered the most reliable basis of determining the true intention of the parties in executing the impugned agreement.

(c) Whether the fact that the parties had willingly executed the impugned agreement or that the complaining party was careless in doing so is a bar to rectification if the impugned clause does not accord with the true agreement between the parties.

[2] The background facts, as found by the trial court and the Court of Appeal, could be summarised as follows: The respondent was a company in the Talam Group of Companies (Talam). Between April 1997 and September 2004, the appellant, a construction company, undertook construction and related works for Talam who could not pay for the said works to the value of RM57,425,697.82 that was due and payable to the appellant. By a "global settlement agreement" dated 29 July 2005 (GSA), the appellant agreed to accept, and Talam agreed to pay RM56m, in cash and kind, to the appellant, in full and final settlement of all dues. Pursuant to the GSA, Talam agreed to pay RM20m and to transfer three lands, namely Lots 50603, 50608 and 50609, all in the district of Petaling, with an agreed combined value of RM36m, to the appellant. Concurrently, the appellant entered into three sale and purchase agreements (SPAs) to 'purchase' those three lots from the respondent and Expand Factor Sdn Bhd, another company in Talam, for RM36m. Also, at the same time, the appellant entered into development agreements with the respondent and Expand Factor Sdn Bhd, whereby the appellant was given all rights to develop those lots and to receive all proceeds

from the development thereof as the developer in place of the respondent and Expand Factor Sdn Bhd who granted a power of attorney to the appellant for the purpose of the development of the said lots by the appellant.

[3] At the material time of execution of the SPAs, two charges were registered against the respondent's Lot 50603, in favour of Pengurusan Danaharta Nasional Bhd (Danaharta) and Malayan Banking Berhad (MBB). One of those charges would prove to be the bone of contention. By letter dated 22 August 2007, the respondent asserted that the appellant had not redeemed Lot 50603 in accordance with cl. 2.2 of the SPAs, and demanded that the appellant, under the threat of termination of the pertinent SPA, to pay the redemption sum of RM7m to redeem Lot 50603 from Danaharta. The appellant contended that cl. 2.2 of the SPA, which provided for the appellant to redeem Lot 50603, was a mistake which did not embody the parties' intention when they executed the agreements, and that Lot 50603 should be transferred to the appellant at Talam's cost and expense.

[4] At the trial court, the appellant sought, *inter alia*, to have cl. 2.2 rectified, by its removal from the SPA. The issues were (i) whether the said cl. 2.2 was a mistake and ought to be rectified by its deletion, (ii) whether the GSA, the SPAs and the power of attorney were intended to be read together, and, (iii) whether the appellant were entitled to specific performance of a rectified SPA. After a full trial, the trial court held that cl. 2.2 was not a mistake, in view of the oral evidence and the preamble to the SPA which stated that lot 50603 was charged to Danaharta and MBB.

[5] At the Court of Appeal, the appellant argued that the trial court had not considered ss. 30-33 of the Specific Relief Act 1950 (Act), that Talam was to pay RM56m in cash and kind, and, that the GSA showed that cl. 2.2 was a mistake. The respondent argued to the contrary. Then in a few short paragraphs (see judgment reported in [2014] 1 LNS 1772; [2015] 3 MLJ 689), the Court of Appeal gave the following reasons for dismissal of the intermediate appeal:

> As stated earlier, we had unanimously dismissed the plaintiff's appeal with agreed costs. In affirming her order, we found that the learned trial judge had not erred in law nor in fact in dismissing the plaintiff's claim, in particular as follows:
>
> (a) in as much as the learned trial judge did not specifically refer to the provisions of ss 30-33 of the Act, she had in fact referred to the authority of the Federal Court case of *Yuson Bien* on the principles of rectification, and by her consideration of the pertinent facts we found that the learned trial judge had in effect applied the provisions of the said sections;
>
> (b) we agreed with the learned judge when she made specific reference to the recital of the SPA3, that is, recital (B) which states:

A

> (B) The Project Land is charged to PENGURUSAN DANAHARTA NASIONAL BERHAD and MALAYAN BANKING BERHAD at the ratio 60:40.

and cl 2.2 of the SPA3 (see para 5 above) to conclude that these provisions were clearly complementary to each other and consistent with the parties' understanding *vis* the effect of cl 2.2. Further, recital (B) was followed by recital (F) to show that the SPA3 was executed to effectuate the parties' intention pursuant to the settlement agreement. Recital (F) states:

B

C

> (F) Simultaneous with the execution of this Agreement, the parties herein together with all such other parties identified/defined/referred to as 'TALAM-GROUP' and 'THE CONTRACTOR' are entering into a global settlement agreement amongst themselves ['the Global Settlement Agreement'] for settlement of the Indebtedness by the TALAM-GROUP to THE CONTRACTOR upon the terms and conditions therein continued, (words, terms and phrases herein being defined in the Global Settlement Agreement.)

D

That being the case, we did not see how it could be said (by the plaintiff) that there was a mistake to include cl 2.2 in the SPA3. In fact it was essential to include cl 2.2 in order to enable the defendant to fulfil its other obligations to surrender the Puchong Lestari Land to the plaintiff. Clause 2.2 provided specifically that it was the plaintiff, as purchaser, to settle, pay, satisfy and redeem the Puchong Lestari Land at RM7m to Pengurusan Danaharta Nasional Bhd and Malayan Banking Bhd in the ratio of 60:40;

E

(c) it therefore followed that any other clauses, such as cll 6.2, 6.12 and 6.16 of the SPA3 which are contradictory to cl 2.2, must necessarily be read subject to cl 2.2;

F

(d) we found that the learned judge had correctly made findings of fact to found her judgment, especially those facts surrounding the negotiations and conclusion of the SPA3 and as an appellate court we do not see any reason to intervene in her findings;

G

(e) it was a significant fact found by the learned judge that after the plaintiff had signed the SPA3, it took the plaintiff two years to raise the issue of mistake in cl 2.2, in a situation where the plaintiff would be busy conducting its land development projects under the settlement agreement as well as under ten other agreements executed pursuant thereto;

H

(f) the fact that the redemption to Malayan Banking Bhd was done by the purchasers of the units sold did not equate it to be done by the defendant. This fact all the more showed the unfairness to the purchasers, let alone to the defendant, on the intransigence of the plaintiff which wanted to renege on a deal already struck with the defendant; and

I

(g) in the circumstances, we agree with the learned judge's finding that the plaintiff had failed to prove its case on the balance of probabilities.

[6] Before us, learned counsel for the appellant orally submitted that the respondent only demanded redemption of the Danaharta charge, that the respondent would not have redeemed Lot 50603 from MBB if it were true that it was the responsibility of the appellant to redeem from both Danaharta and MBB, that any conflict in the SPA should be resolved in accordance with cl. 7 of the GSA, that the courts below took an interpretative approach which was contrary to ss. 30-33 of the Act, that the court failed to compare the SPA with the GSA or examine the outward acts of the parties, and, that it was no defence that the appellant was careless.

[7] In his written submission, learned counsel for the appellant raised the following arguments. The principal error of the courts below was to take the interpretative approach and to conclude that the meaning of the impugned clause was plain and unambiguous. The rectification power of the court is not to resolve a disputed clause from the standpoint of ambiguity but from the true agreement reached by the parties (*Oh Hiam & Ors v. Tham Kong* [1980] 1 LNS 53; [1980] 2 MLJ 159 was cited). The approach of the courts below defeated the very purpose of the rectification jurisdiction of the court. The courts below failed to apply the two most important criteria, namely, the true intention of the parties, and, the outward acts of the parties, to decide if there was a mistake (Pollock & Mulla on the *Indian Contract and Specific Relief Act* 12th edn. vol. II at p. 2627, *Snell's Equity* 32nd edn. at para. 16-001 and 16-013, *Chartbrook Ltd v. Persimmons Homes Ltd* (2009) 4 All ER 677, *Frederick E Rose Ltd v. WM H PIM Ltd* (1953) 2 All ER 739 at 747, *Natarajan Asari v. Pichamuthu Asari* AIR 1972 Madras 192, *Haji Abdul Rahman Allarakhia & anor v. The Bombay and Persia Steam Navigation Company* 16 ILR 561, *Yuson Bien & Anor v. Bankers Trust Co Ltd* [1979] 1 LNS 131; [1980] 1 MLJ 32, were cited). The courts below failed to appreciate that the fundamental difference between *Yuson Bien & anor v. Bankers Trust Co Ltd* and the instant case was the antecedent agreement that was binding on the respondent. A court will be prepared to find mistake if there is an independent outside document between the parties that points to the fact that the term in the contract was a mistake (*Southwind Development Sdn Bhd v. Hass Plantation Sdn Bhd* [1995] 1 LNS 225; [1996] 5 MLJ 85 was cited). The approach to determine intention is objective and not subjective. Lack of care on the part of the plaintiff or solicitor is no bar to rectification (*Weeds v. Blaney* [1978] 2 EGLR 84 was cited). Learned counsel for the appellant also pointed to the evidence and pertinent clauses in the GSA, development agreement and SPA that allegedly bore out the "mistake".

[8] Learned counsel for the respondent orally replied that the GSA, which was signed together with the SPAs, was not an antecedent agreement, that cl. 2.2 was in the draft SPA, and that there was no evidence that the draft was different from the SPA. In his written submission, learned counsel for the respondent submitted as follows. The first leave question, which was premised on *Chartbrook*, leaped into the test applicable in the evaluation of evidence without first determining the type of evidence that is admissible. The first leave question must be determined by a two stage process, namely, (i) a determination of the type of evidence that is admissible; and (ii) an evaluation of the admissible evidence. There appears to be a divergence of opinion as to the test applicable at the second stage. Lord Hoffmann in *Chartbrook* suggested the objective approach, whilst learned authors of *Spry's The Principles of Equitable Remedies* 8th edn., *Snell's Equity* 32nd edn. and *Chitty on Contract* 31st edn. as well as some Australian and New Zealand courts disagreed with the wholly objective test. The better approach is the flexible approach, according to the facts and circumstances of each case. The singular inflexible approach is not suitable in the realm of equity. Section 30 necessitates the court to find the real intention of the parties. Section 31 states that the court must be satisfied that the parties intended to make an equitable and conscientious agreement. A purely objective test which puts a limitation on the approach to be taken by the court conflicts with those provisions. The second and third leave questions are factual and not novel questions of law. *Yuson Bien & anor*, which is still the leading authority on the correct test to be applied for the rectification of a mutual mistake, laid down that the court would look into the antecedent and common intention of the parties prior to the execution of the instrument and would not grant rectification if that common intention could not be ascertained (*Chester Chai Chung Ching & Ors v. Diversey (Far East) Pte Ltd* [1991] 3 CLJ 2632; [1991] 4 (Rep) 737 was cited). Lord Hoffmann in *Chartbrook* adopted the requirements for rectification laid down in *Swainland Builders v. Freehold Properties Ltd* [2002] EWCA Civ 560. In *Rose v. Pim*, it was held that the important factor to determine whether there was mutual mistake is to consider what the parties wrote to one another and compare that with the executed instrument. Those cited authorities are at one that the one important factor is the evidence prior to execution of the instrument. Based on those cited authorities, the approach of the court should be as follows: (i) there must be convincing evidence of common and continuing intention leading up to the execution of the written instrument, (ii) no rectification can be ordered if the contemporaneous evidence prior to execution of the instrument is vague and inconclusive and it is impossible to ascertain the intention of the parties, (iii) when it is impossible to ascertain the intention of the parties prior to execution of the instrument, then the written agreements shall be the concluded terms of the parties, and (iv) the burden of proof is on the party alleging mutual mistake. There was no contemporaneous evidence. The testimony of PW1 was not

contemporaneous evidence. The courts below were right to refuse rectification. The fair copy of the SPA was the only contemporaneous evidence. PW1 admitted that his general manager had read and informed him that the agreements were safe to be signed. The fair copy of the SPA was consistent with the executed agreement. The GSA, which was signed simultaneously, was not contemporaneous evidence prior to the execution of the SPA. Based on the above cited authorities, the GSA could not be relied as evidence for the purpose of rectification of cl. 2.2 of the SPA. The courts below were correct to hold that cl. 2.2 was clear and unambiguous. It was highly probable that the appellant could have agreed to pay the redemption sum on account of the considerable potential profits to be gained from the development rights. PW1 was given an advance copy of the agreement. The appellant's general manager had perused the agreements and confirmed to PW1 that all agreements were in order. PW1 and the appellant's general manager would have detected the purported mistake. The appellant did not complain about any mistake. It was only two years later that mistake was raised. Mistake was an afterthought. There was no mutual mistake. A unilateral mistake is no ground for rectification (*Southwind Development Sdn Bhd v. Has Plantation, Foo Lian Sin & Anor v. Ng Chun Lin & Anor* [2004] 4 CLJ 220; [2006] 1 MLJ 457 and *Yuson Bien & anor v. Bankers Trust Co Ltd* were cited).

[9] It is fitting to first quote from two authoritative texts that bear upon the issues and arguments.

> Contracting parties may execute a document purporting to contain the terms previously agreed between them. If, as a result of a mistake, the document fails to contain all those terms, or contains different terms, the court may rectify it by ordering its wording to be changed so as to bring it into line with the earlier agreement; alternatively, the court may treat the document as having been so rectified without making a formal order for its rectification. Having been developed in equity, rectification is a discretionary remedy. It is available where there has been a mistake, not in the making, but in the recording, of a contract: 'Courts of equity do not rectify contracts; they may and do rectify instruments'. Rectification can be ordered although the contract is one which must be in, or evidenced in, writing. An entire agreement clause in the executed document does not preclude a claim in rectification. The requirements to be met differ according to whether the mistake is made by both parties, or only one (Treitel, *The Law of Contract,* 13th Edition at 8-059).

> In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject matter of their contract has already perished. In mutual mistake, the parties misunderstand each other and are at cross-purposes. A, for example, intends to offer his Toyota Prius car for sale, but B

A believes that the offer relates to the Toyota Aventis also owned by A. In unilateral mistake, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake. Suppose, for instance, that A agrees to buy from B a specific picture which A believes to be a genuine Constable but which in fact is a copy. If B is ignorant of A's erroneous belief, the case is one of mutual mistake, but, if he knows of it, of
B unilateral mistake. When, however, the cases provoked by these factual situations are analysed, they will be seen to fall, not into three, but only into two distinct legal categories. Has an agreement been reached or not? Where common mistake is pleaded, the presence of agreement is admitted. The rules of offer and acceptance are satisfied and the parties
C are of one mind. What is urged is that, owning to a common error as to some fundamental fact, the agreement is robbed of all efficacy. Where either mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and that therefore the transaction must necessarily be void (*Cheshire, Fifoot & Furmston's Law of*
D *Contracts* 16th Edition at 294).

[10] Rectification of instruments "is a remedy that has been granted by courts of equity for many centuries" (*Spry's Equitable Remedies* 9th edn. at 630). Chapter III of the Specific Relief Act 1950 provides that remedy to a party to a contract or other instrument in writing to have the instrument
E rectified. Sections 30-32 of the Specific Relief Act 1950 read:

> 30. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has
F been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.
>
> ILLUSTRATIONS
G
> ...
>
> 31. For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.
>
H 32. In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be.

[11] In a suit for rectification of an instrument, the court "is not confined
I to the enquiry what the language of the instruction was intended to be". "The court is not confined to a construction of the instrument, which is also a technique used to correct mistakes in expression without recourse to

rectification" (see *Construction of Contracts, Interpretation, Implication, and Rectification* 2nd edn. by Gerard McMeel at 17.02-17.03, 17.11-17.12). But "before a mistake in a document can be corrected by construction and without resort to rectification (1) there must be a clear mistake and (2) it must be clear what correction must be made to cure the mistake" (*Rectification - The Modern Law and Practice Governing Claims for Rectification for Mistakes* by David Hodge at 2-20). "Rectification is different from construction. The ingredients of the causes of action are not the same. The primary purpose of a construction action in relation to an instrument is to ascertain the intention of the maker from the words used by him, whereas the primary purpose of a rectification action is to substitute new words for those actually but mistakenly used by the maker in order to reflect his true intention" (*Syed Yacob v. Syed Alwee & Ors* [1990] 1 LNS 163; [1991] 1 MLJ 453, per Chan Sek Keong J, as he then was; see also *Harper v. Interchange Group Ltd* [2007] All ER (D) 169 (Aug) at para. 89). Rectification of a contract and construction of a contract are conceptually different (*Solarus Projects Pty Ltd v. Vero Insurance Ltd* [2013] NSWSC 328) "Rectification and construction are two different things" (*Damco Nominees Pty Ltd v. Moxham* [2012] VSC 79 per Mukhtar AsJ). "Interpretation and rectification should have separate domains" ("*Rectifying the course of rectification*" (2012) 75(3) Modern Law Review 412). " ... if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face ... " (*Marley v. Rawlings & Anor* [2014] UKSC 51 per Lord Neuberger P, delivering the judgment of the court).

[12] Rectification is also different in one vital respect. "As a matter of current English law, the courts are able to consider all the evidence in rectification cases, whilst the exclusionary rules (especially as to prior negotiations and declarations of subjective intent) still constrain the construction process. Indeed that curious and somewhat artificial approach was recently confirmed by the House of Lords in *Chartbrook Ltd v. Persimmons Homes Ltd … "* (*Construction of Contracts, Interpretation, Implication, and Rectification* 2nd edn. by Gerard McMeel at 17.01; see also *Prenn v. Simmonds* [1971] 1 WLR 1381 per Lord Wilberforce). "The established rule is that in interpreting a contract, it is permissible to look at the factual matrix, but the evidence of negotiations and statements of subjective intention must be disregarded ... But it is inapplicable when the issue is, instead, one of contract formation. It is likewise inapplicable when rectification is claimed: evidence of negotiations and all other surrounding circumstances will be received" (*Fletcher Challenge Energy Ltd v. Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 at para. 56 per Richardson P, Keith, Blanchard and McGrath JJ). Evidence which is not admissible on the question of construction is admissible on the question of rectification (*Yap Phooi Yin & anor v. CM Boyd* [1981] 1 LNS 144; [1982] 1 MLJ 151, per Raja Azlan Shah Ag LP, as HRH then was).

[13] It should also be noted that there is a world of difference between 'mistake' under s. 21 of the Contracts Act 1950 and 'mistake' under s. 30 of the Act. The mistake under s. 21 of the Contracts Act is "mistake as to a matter of fact essential to the agreement", which vitiates the instrument and renders it void. The mistake under s. 21 of the Contracts Act is the common mistake of *Cheshire, Fifoot & Furmston supra* at 294. Whereas, the mistake under s. 30 of the Act is "when, through a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention", and either party, or his representative in interest, may institute a suit to have the instrument rectified.

[14] In *Lovell & Christmas Ltd v. Wall* [1911] 104 LT 85 at 88, which was the only case cited in *Words and Phrases Legally Defined* 3rd edn. vol. 4 at 33 to explain "rectification of contracts", Cozens-Hardy MR said:

> The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. Indeed, it may be regarded as a branch of the doctrine of specific performance. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential.

[15] The aforesaid passage from the judgment of Cozens-Hardy MR was cited with approval in *Oh Hiam & Ors v. Tham Kong* [1966] 1 LNS 12; [1967] 1 MLJ 65, *Chee Lui Teen v. Kiet Hoe Development Sdn Bhd* [1987] 1 LNS 132; [1988] 1 MLJ 514, and, *Ng Chun Lin & Anor v. Foo Lian Sin & Anor* [2000] 6 CLJ 133; [2000] 6 MLJ 81. But given that s. 30 of the Act requires the court to ascertain the real intention of the parties, the following passage from the judgment of Buckley LJ better reflected the intent of s. 30 of the Act:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.

[16] Both passages from the judgments of Cozens-Hardy MR and Buckley LJ were referred in *Joscelyne v. Nissen* [1970] 1 ALL ER 1213, where Russell LJ, delivering the judgment of the court, disagreed that rectification may be regarded as a branch of specific performance:

> We have been puzzled by the suggestion of the Master of the Rolls in the Lovell & Christmas case 104 L.T. 85 that rectification should be regarded as a branch of the doctrine of specific performance: we do not see any necessary connection, more particularly since rectification is available in the case of voluntary settlements.

[17] But more crucially, Russell LJ disagreed with the position held since *Mackenzie v. Coulson* (1869) LR 8 Eq 368 per Sir William Milbourne James V-C that "it is always necessary for a plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified". After a critical study of the authorities which held that there must be an antecedent contract before a contractual instrument may be rectified by the court, namely *Mackenzie v. Coulson*, the judgments of Cozens-Hardy MR and Fletcher Moulton LJ in *Lovell & Christmas v. Wall*, *Faraday v. Tamworth Union* (1916) 86 LJCh 436, *W Higgins Ltd v. Northampton Corporation* [1927] 1 Ch 128, *Schofield v. WC Clough & Co* [1913] 2 KB 103, *United States of America v. Motor Trucks Ltd* [1924] AC 196, and the authorities which held to the contrary, namely *Shipley Urban District Council v. Bradford Corporation* [1936] Ch 375, *Crane v. Hegeman-Harris Co Inc* [1939] 1 All ER 662, *Frederick E Rose (London) Ltd v. William H Pim Jnr & Co Ltd* [1953] 2 QB 450, *Earl v. Hector Whaling Ltd* [1961] 1 Lloyd's Rep 459, Russell LJ held that "the law is as expounded by Simonds J in *Crane*'s case":

> Next we have *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662 decided by Simonds J. The facts need not be set out. The judge said, at p. 664:
>
> > Before I consider the facts and come to a conclusion whether the defendants are right in their contention, it is necessary to say a few words upon the principles which must guide me in this matter. I am clear that I must follow the decision of Clauson J., as he then was, in *Shipley Urban District Council v. Bradford Corpn*. [1936] 1 Ch. 375, the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I shall continue to exercise the jurisdiction which Clauson J., as I think rightly, held might be entertained by this court.

> Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as 'irrefragable' that the court can act. I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is in the light of those principles that I must examine the facts of this somewhat complicated case.

It is, we think, probable that the eminent counsel concerned in the case did not really dispute that Clauson J.'s opinion represented the law on the relevant point:

> ...
>
> Accordingly we have in *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662; [1939] 4 All E.R. 68, in both courts an acceptance of the law on rectification as not requiring a complete antecedent concluded contract, in a case in which the decision must have been otherwise if such an antecedent contract was essential to rectification. But it seems to us that the contrary was not really argued, and we leave aside for the moment whether in those circumstances the principles of precedent require us to be bound by this case on the relevant point.
>
> Next we refer to the horsebeans case in this court, *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.* [1953] 2 Q.B. 450. That was a case in which there was nothing that could be described as an outward expression between the parties of an accord on what was to be involved in a term of a proposed agreement. It turned out that locked separately in the breast of each party was the misapprehension that the word "horsebeans" meant another commodity, but as we understand the case there was no communication between them to the effect that when they should speak of horsebeans that was to be their private label for the other commodity. The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties. Denning L.J. said, at p. 461:

> It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375); but, formalities apart, there must have been a concluded contract. There is a passage in *Crane v. Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662, 664, which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn around and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different [Denning L.J.'s italics]: see *Lovell & Christmas v. Wall* (1911) 104 L.T. 85, per Lord Cozens-Hardy M.R., and per Buckley L.J. at pp. 88, 93, but not that they intended something different.

In so far as this passage might be taken to suggest that an antecedent complete concluded contract is necessary it would be in conflict with the views of both courts in *Crane v. Hegeman-Harris* [1939] 1 All E.R. 662; [1939] 4 All E.R. 68, and is not supported by the other judgments. In so far as it speaks of agreement in the more general sense of an outwardly expressed accord of minds it does no more than assent to the argument of Mr. Roche, at p. 457, as to the true width of the views of Simonds J.

We conclude this review of authority with a few other cases to which our attention was drawn. In *Earl v. Hector Whaling Ltd.* [1961] 1 Lloyd's Rep. 459, Harman L.J. said, at p. 470:

> As to the facts it does not appear to me that there ever was an oral agreement. There was a common intention and that is enough. In spite of Denning L.J.'s observations in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.* [1953] 2 Q.B. 450, 461; I think that Clauson J.'s original decision in *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375 (as followed by Simonds J. in *Crane v. Hegeman-Harris Company Inc.* [1939] 1 All E.R. 662, 664) that you do not need a prior contract, but a prior common intention, is right: and here, as it seems to me, both parties always intended that there should be a written agreement, and they came to a common intention as to what that written agreement was to be, or thought they did: and if the evidence satisfied one that that common intention did not appear in the written document, then you would have a case for rectification.

We do not take Pearce L.J. to suggest the contrary view, at p. 468.

Lastly, reference was made to a decision of Megaw J. shortly noted in *London Weekend Television Ltd. v. Paris and Griffith* (1969) 113 Sol J. 222. He expressed the view that the propositions of Simonds J. in *Crane*'s case [1939] 1 All E.R. 662 were binding as a result of their express approval by this court. He then used this phrase, according to the report, a phrase which if correct covers the present case, at p. 222:

> Where two persons agreed expressly with one another what was the meaning of a particular phrase but did not record their definition in the contract itself, if one of the parties sought to enforce the agreement on the basis of some other meaning, he could be prevented by an action for rectification.
>
> In our judgment the law is as expounded by Simonds J. in *Crane*'s case with the qualification that some outward expression of accord is required. We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase "convincing proof" without echoing an old-fashioned word such as "irrefragable" and without importing from the criminal law the phrase "beyond all reasonable doubt". Remembering always the strong burden of proof that lies on the shoulders of those seeking rectification, and that the requisite accord and continuance of accord of intention may be the more difficult to establish if a complete antecedent concluded contract be not shown, it would be a sorry state of affairs if when that burden is discharged a party to a written contract could, on discovery that the written language chosen for the document did not on its true construction reflect the accord of the parties on a particular point, take advantage of the fact.

[18] Russell LJ endorsed the view expressed by Simonds J in *Crane v. Hegeman-Harris* and rejected the contention that a prior agreement was required and instead favoured a broader approach based on continuing common intention with the qualification that 'some outward expression of accord' is required.

[19] But the requirement that the continuing common intention must be made manifest by some outward expression of accord' was soon questioned by jurists and writers.

[20] Leonard Bromley QC suggested that *Joscelyne v. Nissen* was wrong "in stating that for rectification of an agreement it is necessary to establish not only continuing common intention of the parties down to the execution of the written instrument but also some 'outward expression of the accord' " and submitted that "rectification ... requires the establishment of the subjective intention of the party or of the parties", and that "intercommunication, however necessary in the common law of contract, properly plays no part either in the theory or in the practice of this equitable doctrine, however much it may be anathema to the common law to consider subjective intention in relation to contracts" (*"Rectification in Equity"* (1971) 87 LQR 532). Leonard Bromley summarised the case against the requirement as follows:

> It may be that the statement in *Joscelyne v. Nissen* that some outward expression of accord is required for rectification of an agreements stems from two sources, first, the fundamental common law principle that in the construction of contracts the courts seek to ascertain the meaning of the words used (adopting an objective approach), rather than searching out

> the subjective intention of the parties, and second that without some outward expression of accord there could be no certainty at all in business transactions. So far as the first is concerned, it is submitted that any such extension into rectification is contrary to both principle and authority and is simply erroneous. As to the second, the extension is unnecessary in practice to safeguard the sanctity of business contracts because of the high standard of proof required - what is needed is, per the American Restatement on Contract, 'clear and convincing evidence'. As Pearce L.J. said in *Earl v. Hector Whaling Ltd*, 'It is a question of fact and degree what weight of evidence is needed to overcome the inherent probability that the parties meant what they wrote and to establish that contrary to it the parties did not mean what they wrote'. The presence or absence of an outward expression of accord may well go to whether the burden of proof can be discharged. It is not, it is submitted, *per se* a requirement of rectification.

[21] Marcus Smith suggested, in "Rectification of contract for common mistake, *Joscelyne v. Nissen*, and subjective state of mind" (2007) 123 Law Q. Rev. 116, that Leonard Bromley's premise was incorrect and "that the equitable doctrine of rectification, so far as it concerns contracts, is concerned only with the objective examination of manifest communications passing between the parties to the contract", which Marcus Smith referred to as the 'objective approach':

> The suggestion that rectification is concerned only with the objective examination of communications between the parties requires consideration of two, related propositions. The first is that the parties' subjective intentions, and any manifestations of those intentions in documents not 'crossing the line', are irrelevant for the purpose of determining whether a contract should be rectified. The second is that it is a misreading of *Joscelyne v. Nissen* to suggest, as many cases and Mr Bromley's article do, that the requirement of a common intention as regards the agreement (or a provision in it) is distinct from the outward manifestations of that intention. It will be suggested that these so-called requirements are 'not two separate conditions, but rather different sides of the same coin, since an uncommunicated inward intention is wholly irrelevant.

[22] Marcus Smith submitted that the line of authority, *to wit*, *MacKenzie v. Coulson*, where it was held by James V-C that it is always necessary for rectification to show an actual concluded contract antecedent to the instrument sought to be rectified, *Shipley Urban DC V Bradford Corp*, where it was held by Coulson J that something less than an enforceable antecedent agreement could be relied upon for rectification, *Crane v. Hegeman-Haris*, where Simonds J followed *Shipley Urban DC* and held that "it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify … the judge held, and I respectfully concur … that it is sufficient to find a common continuing

intention ... ", *Rose v. Pim*, where all three judges held that the subjective beliefs of the parties were irrelevant and that what mattered was the parties' antecedent intention, and, *Joscelyne v. Nissen*, where Russell LJ (who delivered the judgment of the court) concluded that the law is as expounded by Simonds J in *Crane*'s case, bore out that subjective intentions and manifestations of those intentions in documents not 'crossing the line' are irrelevant, that the requirement of a common intention and the outward manifestation of that intention are just different sides of the same coin, and that *Joscelyne v. Nissen* did not add an additional requirement but rather only qualified Simonds J's statement of the law by asserting the need for 'some outward expression of accord'. Marcus Smith contended that decisions since *Joscelyne v. Nissen* that treated those requirements as different sides of the same coin "more accurately stated the law as laid down in *Shipley, Hegeman-Haris*, and *Joscelyne v. Nissen* itself", that any approach combining both the subjective and objective approaches would result in a test for rectification that would be impossible to apply, and that the approach in *NSW Medical Union Ltd v. Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740 had reduced the requirement of 'some outward manifestation of accord' from a substantive to an evidential requirement. Marcus Smith advocated the objective approach.

[23] Professor David McLauchlan regarded both approaches "as too extreme" ("*The Drastic Remedy of Rectification for Unilateral Mistake*" (2008) 124 Law Q Rev 608):

> It will be apparent from my discussion in Pt II that I regard both approaches as too extreme. Smith rightly stressed that in this area 'Equity's role is as a supplement, rather than as a rival, to the common law and that rectification ought to be consistent with the common law principles of contract formation. But, as we have seen, a contract may arise from a proven actual mutual intention or an objective consensus (in the sense that the promisor has led the promise reasonably to believe that the latter's understanding of the agreement has been accepted by the promisor). On this basis there ought to be no question of one being required to the exclusion of the other before rectification can be granted. In other words, there is no need for the law to make a choice between a wholly subjective approach and a wholly objective approach. Neither should there be any question of there having to be two separate conditions, both a subjective and an objective consensus, for rectification. Rather, they are truly alternative bases on which rectification can be ordered. Either a pre-existing actual consensus or an objective consensus not reflected in the final written contract should suffice.
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> ...
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> The author [Marcus Smith] is clearly correct that the objective consensus should suffice for rectification, but it does not follow that this should be required in all cases. If the court is satisfied that a written contract has been entered into that fails to reflect a clearly proven and continuing actual mutual intention, rectification should not be denied because that

> intention' is only evidenced through internal documents. Further, if rectification required a wholly objective approach, how can it be that, as seems to have been well accepted, that the court may have regard to the subsequent conduct of the parties in determining whether there is sufficient proof of an antecedent common intention not reflected in the document? ... However, if the test of intention is wholly objective in the sense that the court is unconcerned with the actual intention of the parties and the question is whether a reasonable man would infer the alleged common intention at the time the contract was formed, the subsequent conduct of the parties, which can only be indicative of their actual intention at the time, must surely be irrelevant.

[24] Some English courts found it hard to accept that 'some outward manifestation of accord' is a requirement of law.

[25] In *Amp (UK) Plc & anor v. Barker* [2000] EWHC Ch 42, Lawrence Collins J held there was no need for an objective manifestation of intention:

> There must, therefore, be cogent evidence of the intentions both of the trustees and of NPI, but necessarily of their agreement or accord. In some of the earlier cases on voluntary settlements, rectification was ordered on the uncontradicted affidavit evidence of the settlor without any need for objective manifestation of intention: see, e.g., *Hanley v. Pearson* (1879) 13 Ch. D. 545 ... It may be that the need for objective manifestation in the case of a unilateral transaction is simply one element of the need for convincing proof of the mistake. It was present in the two modern cases on mistake in unilateral transactions, R Butlin's Settlement and *Gibbon v. Mitchell* [1990] 1 WLR 1304, infra para 81 ... The certainty of transactions would be undermined if the court could act, otherwise than in exceptional circumstances, simply on the assertion of a party to the transaction.

[26] In *Gallaher Limited v. Gallaher Pensions Limited and Others* [2005] EWHC 42 (Ch) Etherton J agreed with Lawrence Collins J that objective manifestation or outward expression of the continuing common intention is not a separate requirement.

> My understanding of paras 67 and 68 of the judgment in AMP is that Lawrence Collins J held that, provided the claimant in a case like the present can show convincingly a continuing common intention by the principal employer and the trustee which, by mistake, is not given effect by the deed of amendment, the discretionary remedy of rectification is in principle available, and objective manifestation or outward expression of the continuing common intention is not a separate requirement. His decision in that respect is not plainly wrong, and, accordingly, as a first instance judge I am bound to follow his decision.

[27] And in *Munt v. Beasley* [2006] EWCA Civ 370, Mummery LJ, (Scott Baker LJJ and Sir Charles Mantell concurred) held "that the recorder was wrong to treat an outward expression of accord as a strict legal requirement for rectification".

A I would also accept Mr Morshead's submission that the recorder was wrong to treat "an outward expression of accord" as a strict legal requirement for rectification in a case such as this, where the party resisting rectification has in fact admitted (see the solicitors' letter of 7 May 2003) that his true state of belief when he entered into the transaction was the same as that of the other party and there was
B therefore a continuing common intention which, by mistake, was not given effect in the relevant legal document. I agree with the trend in recent cases to treat the expression "outward expression of accord" more as an evidential factor rather than a strict legal requirement in all cases of rectification: see *Gallaher v. Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at paragraphs 116-118; *Westland Savings Bank v. Hancock* [1987] 2 NZLR 21
C at 29, 30; and *JIS (1974) Ltd v. MCP Investment Nominees Ltd* [2003] EWCA Civ 721 at paragraphs 33-34; cf *Frederick E Rose (London) Ltd v. Wm Pim & Co Ltd* [1953] 2 QB 450 at 462 per Denning LJ and *Swainland Builders Ltd v. Freeland Properties Ltd* [2002] 2 EGLR at 74.

D **[28]** *Spry – Equitable Remedies* 9th edn. at 634 agreed that the suggestion that the agreement in question must have come into existence prior to the execution of the document is contrary to principle. *Spry supra* observed that it is not possible to find any basis for the requirement – "outward expression of accord is required" – in equitable principle:

E It has from time to time been suggested that the agreement in question must have come into existence prior to the execution of the document. This view is contrary to principle, and the relevant enquiry should be, not as to the parties' intention at a prior time, but as to their intention at the time of execution. So reference may be found from early times to 'the concurrent intention of all parties' and more recently it has been affirmed
F that it is the concurrent intention of the parties at the time of execution, rather than their intention at a time of earlier agreement, if any, that is material.

It has also been suggested that it is not enough that there should have been a common concurrent intention of the parties and that 'some outward expression of accord is required'. It does not, however, appear
G to be possible to find any basis in equitable principle for a requirement of this kind, and its appropriateness has been commented on. The history and nature of the remedy of rectification are such that the validity of this suggested requirement should not be accepted, since the concern of courts of equity has always been with the actual intention of those concerned. Rectification is an equitable remedy, not a legal remedy.

H **[29]** Meantime, in *Establissements Georges et Paul Levy v. Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyds's Rep 67, Mustill J, set out the key principles relating to the rectification of documents, which proposed that the continuing common intention must be objectively
I manifested by words and acts:

1. The remedy of rectification is available only for the putting right of a mistake in the terms of a document which purports to record a previous transaction. It is not an appropriate remedy where the mistake relates to the transaction itself rather than to the document which purports to record it.

2. Rectification may be granted in two situations: (a) where there is a mistake common to both parties, the mistake being the belief that the document accurately records the transaction. (The fact that the mistake must be shared does not necessarily mean that it must arise in the same way on each side. Very often the mistake of one party occurs in the writing and of the other in the signing of the document, but the mistaken belief is common to both); (b) where one party is mistaken as to the compliance of the document with the transaction and the other party knows of this mistaken belief but does nothing to correct it. The person seeking rectification in this situation must, in effect establish that his opponent was guilty of sharp practice.

3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter (cited with approval in *Chartbrook v. Persimmon* at para 61).

4. The court must be satisfied not only that the document fails to reflect the prior agreement or intention but also that there was a prior or common agreement (or intention) in terms which the court can ascertain.

5. The court requires the mistake to be proved with a high degree of conviction before granting relief. There are sound policy reasons for this. The Court is reluctant to allow a party of full capacity who has signed a document with opportunity of inspection, to say afterwards that it is not what he meant. Otherwise, certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations ... " (which was applied in *Ted Baker plc and anor v. AXA Insurance UK plc and ors* [2012] EWHC 1406 (Comm); in *Entaco Limited v. Prym Consumer Gmbh* All England Transcripts 14 December 1999, Brooke LJ said that as a matter of law, a party seeking rectification must produce 'convincing proof' not only that the document was not in accordance with the parties' true intention, but that the document in the proposed form accorded with their intentions).

[30] "This summary of principle must undoubtedly be read in the light of subsequent authorities, but it broadly represents the modern law of rectification [in England]." (*Construction of Contracts, Interpretation, Implication, and Rectification* 2nd edn. by Gerard McMeel at 17.37).

[31] In *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, at 912-913, Lord Hoffmann set out the following principles of construction, which principles 4 and 5 introduced, according to Sir Richard Buxton's "*Construction and Rectification after Chartbrook*" 69 [2010] Cambridge Law Journal 253, a new approach [on construction], in that it "overrode the previous understanding that, rectification apart, the court could not depart from the words of the document to find an agreement different from that stated in the document":

> (1) Interpretation is the ascertainment of the meaning which the H document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background of the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749.
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone

> wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201.

[32] And in *Swainland Builders Ltd v. Freehold Properties Ltd* [2002] 2 EGLR 71, Peter Gibson LJ thus summarised the requirements for 'common mistake rectification':

> The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect the common intention.

[33] That statement of principle was expressly adopted by the House of Lords in *Chartbook*. In the wake of *Swainland and Chartbrook*, *Construction of Contracts, Interpretation, Implication, and Rectification* 2nd edn. by Gerard McMeel at 17.42 thus construed the law in England:

> The modern law is that either a prior concluded agreement or a continuing common intention will suffice. Older cases speak about a concluded prior agreement (subject to ignoring any formal requirements) as a crucial precondition to common mistake rectification. That the requirement is either a binding antecedent agreement or a continuing common intention was confirmed by the House of Lords in *Chartbrook Ltd v. Persimmons Homes Ltd*.

[34] In *Chartbrook*, the contract provided a price formula for payments. The developer's case was that what was intended was that the owners would be paid either a fixed percentage of the sale revenue for the flats or the minimum guaranteed for the flat, whichever was greater. The owners contended that they were entitled to both, on a strict reading of the contract and the definition clause. The case was argued and decided on the assumption that the requirement was that both parties should be mistaken about whether the document reflected their subjective beliefs as to what the prior consensus was. The claim for rectification was dismissed at trial, because Briggs J accepted the evidence of the owners that they understood the clause to be cumulative and therefore the mistake was not common to both sides. Lord Hoffman, who had the agreement of all members of the appellate committee, accepted the argument that the requirement was merely a mistake as to whether the document accurately reflected the prior consensus, which consensus had to be judged objectively, and on that basis, the owners were also mistaken, because the relevant clause did not reflect the prior consensus as ascertained by the reasonable person. Lord Hoffmann also confirmed the need for "an outward expression of accord". At para. 60, Lord Hoffmann said the following, which would prove to be highly contentious:

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> Now that it has been established that rectification is also available when there is no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the 'common continuing intention' were to be an objective fact if it amounted to an enforceable agreement but a subjective belief that it did not.

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[35] According to *Construction of Contracts, Interpretation, Implication, and Rectification* 2nd edn. by Gerard McMeel, which analysed the case, *Chartbrook* is now authority that the test for judging each party's intentions for the purpose of identifying a "common continuing intention" is objective and that the subjective test which required an investigation into each party's

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actual state of mind was mistaken (see 17.46), that the objective test prevails (see 17.52), that the outward expression of accord is a requirement (see 17.53), and, that the common intention must be proved to have continued up to and at the time of the execution of the instrument sought to be rectified (see 17.54). "After *Chartbrook*, it would appear that Lord Hoffmann's

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analysis is now the authoritative one. All that was required on the facts of *Chartbrook* was that both sides were mistaken, *albeit* that they were not labouring under identical mistakes. On the developers' side, it was obvious that their representatives wrongly believed that the written contract matched the objectively ascertained prior accord (and their subjective intent) that the

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two elements of the price were alternatives, not cumulative. Conversely, on the owners' side, it was held sufficient that the written contract did not correspond to the objectively ascertained prior accord. The common mistake has been reduced to the requirement that both parties were mistaken in thinking that the document represented the prior accord (which is judged

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objectively)" (see 17.61).

[36] *Albeit* the view of jurists and writers, 'some outward expression of accord' is a requirement for rectification and the test for judging each party's intentions for the purpose of identifying a 'common continuing intention' is objective in England.

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[37] In *Daventry District Council v. Daventry & District Housing Ltd* [2011] EWCA Civ 1153, the Court of Appeal (Lord Neuberger MR, Toulson, Etherton LJJ) thus interpreted *Chartbrook*:

> Lord Neuberger MR, as he then was:
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> 125. However, as has been explained in all three judgments on this appeal, Lord Hoffmann's speech in *Chartbrook* ... establishes that the issue as to whether there was a common mistake must be judged objectively.
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> 126. It is therefore unnecessary to consider whether rectification should also be granted on the ground of unilateral mistake. But, at least as it
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> appears to me at the moment, (i) there is much to be said for the view that many rectification claims which might previously have been regarded as based on unilateral mistake may now be better treated as being based

on common mistake, and (ii) if we were deciding this appeal without the benefit of Lord Hoffmann's analysis, I might not have thought it right to allow the appeal on the ground of common mistake, although I may have done so on the ground of unilateral mistake.

[38] Toulson LJ, as he then was, had misgivings about the correctness of the objective approach but felt constrained to follow *Chartbrook*:

176. Notwithstanding the immense respect due to Lord Hoffmann and other members of the House of Lords, I have difficulty in accepting it as a general principle that a mistake by both parties as to whether a written contract conformed with a prior non-binding agreement, objectively construed, gives rise to a claim for rectification. Take a simple example. A and B reach what they understand to be an agreement in principle. They confirm it by an exchange of letters. A believes that the correspondence means x. B believes that it means y. Neither is aware that the other's understanding is different and there is no question of either behaving in such a way as to mislead the other. They then enter into a written contract which both believe gives effect to the agreement. They are both wrong. Objectively construed, the non-binding agreement meant x but the written contract means y. On the *Chartbrook* principle, A is entitled to have the contract rectified to conform with the correspondence. I share Professor McLaughlan's difficulty in seeing why it should be right to hold B to a contract which he never intended to make and never misled A into believing that he intended to make.

177. In such a case it is hard to see why the written contract should not prevail. Rectification complements the rules of construction of contracts and serves a similar purpose. In general terms, the purpose is that the contract should give effect to what the parties intended should be the contractual bargain or, in some cases, what the party claiming rectification was led or encouraged by the other party to believe was to be the contractual bargain. Rectification in the example given above would not achieve that purpose. Rather, it would bind a blameless party to a re-formed contract which he did not intend.

179. Despite my concern about the correctness of the principle of the decision in *Chartbrook* on the rectification issue, this court ought in my view to follow it in the present case for a combination of reasons.

180. First, although the decision on the point was obiter, it was the considered unanimous opinion of the House of Lords on a point which had been argued. It would be a bold course for this court not to follow it.

181. Secondly, we did not ourselves hear argument on this point.

[39] Etherton LJ, as he then was, analysed the law in the light of *Chartbrook*, rephrased Gibson LJ's statement of the requirements for rectification for mutual mistake, and accepted the evidential value of subjective belief (Lord Neuberger endorsed Etherton LJ's judgment at paras. 80 - 90):

78. Although the observations of Lord Hoffmann in *Chartbrook* about rectification (quoted in 54 above) were not essential for the decision in that case, they were delivered after full argument, were approved by the other members of the Appellate Committee, and set out established principles rather than seeking to change them. Both parties before us have rightly proceeded on the basis that they correctly state the existing law.

79. Lord Hoffmann's comments were about rectification for mutual mistake. He approved (at 48) Peter Gibson LJ's succinct summary of the requirements for rectification for mutual mistake in Swainland at 33 (quoted in 52 above).

80. Lord Hoffmann's clarification was that the required "common continuing intention" is not a mere subjective belief but rather what an objective observer would have thought the intention to be: see *Chartbrook* at 60. In other words, the requirements of 'an outward expression of accord' and 'common continuing intention' are not separate conditions, but two sides of the same coin, since an uncommunicated inward intention is irrelevant. I suggest that Gibson LJ's statement of the requirements for rectification for mutual mistake can be re-phrased as: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) which existed at the time of execution of the instrument sought to be rectified; (3) such common continuing intention to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and (4) by mistake, the instrument did not reflect that common intention.

81. Three further points of principle should be noted. First, as Lord Hoffmann said (at 65), evidence of a party's subjective belief or understanding is not inadmissible. It may have some evidential value as to what was actually said and agreed, although, where the prior consensus is expressed entirely in writing, it is likely to carry very little weight.

82. Secondly, and which is really an aspect of the same point, a party can always give evidence that the wording of the document was the result of a mistake. That is an essential part of the cause of action. Whether or not the mistake is such as to give rise to a right to rectification will, however, depend on the objective assessment of whether there was a common continuing intention to which the document failed to give effect.

83. Thirdly, rectification is a discretionary remedy. In the case of unilateral mistake, the Claimant's conduct, such as its own carelessness, may preclude refusal of the remedy: see, for example, *Agip SpA v. Navigazione Alta Italia SpA* [1984] 1 Loyd's Rep 353. That consequence may simply be the result, as it was in that case, of the inability of the Claimant to show that it was the Defendant's unconscionable conduct rather than the Claimant's own deficiencies, which caused the mistake: as Stuart-Smith LJ explained in *Commission for the New Towns v. Cooper (Great Britain) Ltd* [1995] Ch 259 at p 279, [1995] 2 All ER 929, [1995] 2 WLR 677:

> It is important to realise that in that case [*viz* Agip] the Defendants did not know of the Plaintiffs' mistake, and the mistake was not in any way attributable to the Defendants' conduct, but solely to the Plaintiffs' carelessness in not reading the charter carefully. In these circumstances, it is plain that it would be quite inequitable to foist upon the Defendants a contract they did not intend to make.

84. It is difficult to see how or why, once the conditions for mutual mistake are satisfied, the Defendant's carelessness could justify refusal of rectification. As the facts of the present case show, however, the Claimant's carelessness may preclude relief, not on some general ground of discretion, but because the Claimant cannot be allowed to rely on its own carelessness in failing to observe that the Defendant objectively no longer, at the date of the instrument to be rectified, continued to adhere to the prior common intention. Agip is, in that very loose sense, a useful analogy.

85. By way of reinforcement of those points, it may be helpful to consider the policy considerations justifying the intervention of equity by rectification for mutual mistake of a contract binding on the parties at common law. There are primarily four factual situations to consider. The first one is where the parties subjectively and objectively (that is to say in their communications passing between them – or "crossing the line") are in agreement but the formal documentation as executed fails to give effect to that prior agreement. The documentation should be rectified to bring it into line (retrospectively) with their prior accord. Subject to such matters as delay and prejudice to any third party interests, there is no good reason not to do so.

86. The second scenario is where the parties never subjectively had the same intention, but the communications crossing the line show that objectively there was a common continuing intention at all relevant times prior to the execution of the final documentation, and the formal documentation reflected those prior communications. In that situation, whether or not rectified, one or other of the parties will be bound by a contract which they did not subjectively intend to enter into. It is right that the Claimant should not be entitled to rectification to bring the documentation into line with a subjective intention and belief that was never communicated to the Defendant and to which the Defendant never agreed.

87. The third scenario is where there was objectively a prior accord, but one of the parties then subjectively changed their mind, but objectively did not bring that change of mind to the attention of the other party. It is right that, if the documentation gives effect to the objective prior accord, the formal documentation should not be rectified to reflect the changed but uncommunicated subjective intention; and if the documentation as executed reflects the changed but uncommunicated subjective intention, it should be rectified to give effect to the objective prior accord. To do otherwise would be to force on one of the parties a contract which they never intended to make on the basis of an uncommunicated intention and belief.

> 88. The fourth scenario is where there was objectively a prior accord (whether or not a subjective common intention), and one of the parties then objectively changed their mind, that is to say objectively made apparent to the other party that they intended to enter into the transaction on different terms. Leaving aside rectification for unilateral mistake (the requirements for which are quite different), it is right that, if the documentation as executed gives effect to the objectively indicated change of mind, a claim for rectification to give effect to the earlier prior accord should be refused. Once again, to do otherwise would force on the Defendant a contract which they never intended to make on the basis of the Claimant's uncommunicated subjective intention to enter into a contract on the basis of the original accord notwithstanding the Defendant's objectively communicated change of mind.
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> 89. That analysis shows why it is good policy to favour objective accord or objective change of accord over subjective belief and intention in cases of rectification for mutual mistake.
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> 90. *Chartbrook* was an example of the second scenario above. The prior objective consensus was based on a letter of 24 May 2001. The terms of that letter were accepted by *Chartbrook*, and no one gave evidence of any subsequent discussions crossing the line which might have suggested an intention by either party to depart from them. The relevant provision in the formal contract was in all material respects the same as it was in all the circulating drafts leading up to that contract.
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> 104. The Master of the Rolls, Toulson LJ and I are all agreed that this court should apply the analysis of Lord Hoffmann in *Chartbrook*, although Toulson LJ, in particular, has some serious misgivings about it. For the reasons I have given earlier, I do not share his misgivings about the objective approach in cases of rectification for mutual mistake. What is clear, however, as the present case shows, is that the objective test requires refinement as different and more complex factual situations present themselves for adjudication. Our different judgments and conclusions in the present case reflect significant differences of view about the way the objective test should be applied on the facts of this case.

[40] Leggatt J, in *Tartsinis v. Navona Management Company* [2015] EWHC 57 (Comm), thus analysed the objective test and the difficulty with it:

> 89. The requirement of an outward expression of accord may be said to introduce an element of objectivity into the test for rectification. But it only makes the test objective in the limited sense that objectively manifested intentions are required, and a mere coincidence of uncommunicated subjective intentions is not enough. It does not detract from the principle that rectification for mutual mistake depends upon proving that both parties actually were mistaken about the effect of the instrument. However, in *Chartbrook v. Persimmon Homes* [2009] UKHL 38, [2009] AC 1101, [2009] 4 All ER 677, the House of Lords, *albeit obiter*, endorsed a much more strongly objective test. Lord Hoffmann, with whose speech the rest of the House agreed, expressed the opinion (at paras 57 - 66) that, to establish a case for rectification, it is both necessary

and sufficient to show a prior consensus which differs from the objective meaning of the contract and that for this purpose the meaning of the prior consensus is what a reasonable observer would have understood it to be and not what one or even both of the parties understood it to be. On this basis, had he not accepted Persimmon's interpretation of the final contract, Lord Hoffmann would have held that Persimmon was entitled to rectification of the contract so that it reflected the way in which a reasonable observer would have understood earlier letters from Persimmon setting out the terms offered. That was so even though *Chartbrook*'s understanding of what both the letters and the final contract meant was different and, on the assumption made, the contract meant what *Chartbrook* thought it meant.

90. I am bound to say that, in company with Morgan J in *Crossco No 4 Unlimited v. Jolan Ltd* [2011] EWHC 803 (Ch) at para 253, I have difficulty with this statement of the test of rectification for common mistake. It is one thing to say that a contract should not be rectified just because both parties privately intend it to bear a meaning different from its meaning objectively ascertained. It is quite another thing, however, to say that a contract should be rectified to conform to what a reasonable observer would have understood the parties previously to have agreed, irrespective of the parties' own understanding.

91. In the first place, I find it hard to see any equity in a doctrine which allows a party to obtain rectification of a document to reflect a view of what had been agreed that the party himself did not actually have, just because a reasonable observer would have taken this to be his view. Equally, I find it difficult to see the equity of imposing the view that a hypothetical reasonable observer would have formed of what had been agreed on a party who did not have that understanding of what had been agreed and whose understanding is reflected in the proper interpretation of the final document.

92. In these situations rectification is not serving to avoid the injustice that would otherwise be caused when the objective principle of interpretation leads to a result which fails to reflect the parties' real intention. Instead, the effect is to treat the objective meaning of communications which were not intended to be legally binding as superior to the objective meaning of the document intended to record the parties' final agreement and to allow the former to displace the latter. The looking-glass logic of this approach was exposed by Hobhouse LJ in *Britoil plc v. Hunt Overseas Oil Inc* [1994] CLC 561, 573, when he said:

> It is contended that this sentence in this informal document which is not intended to have legal effect is to be treated as a superior statement of the parties' agreement and is to displace the clear language of the considered and carefully drafted definitive agreement.
>
> It can immediately be seen that this proposition needs to be carefully examined. As a matter of logic it can lead to the result that where there is a succession of documents of increasing

> formality but without legal effect leading up to a final considered legal document, the ascertainment of the actual agreement between the parties can be thrown back to the successively less formal, less considered and less carefully drafted earlier documents. This cannot be right.
>
> In the *Britoil* case the Court of Appeal - by a majority, with Hoffmann LJ dissenting - held that rectification for common mistake is available only where it is proved that both parties were in fact mistaken about the effect of the final document. Although the decision in the *Britoi*l case was not disapproved, that requirement was not satisfied on the facts assumed in the *Chartbrook* case.
>
> 93. A further objection to the approach adopted in *Chartbrook* is that it allows a party who is mistaken about the effect of a contractual document although the other party is not to obtain rectification of the document without satisfying the requirements which must generally be satisfied before rectification will be granted on the basis of a unilateral mistake. Those requirements are the subject of a distinct body of case law. Broadly speaking, rectification will only be granted in cases of unilateral mistake where the other party knows of the mistake and it is inequitable for him to take advantage of it: see *Chitty on Contracts* (31st edn) at 5-122 - 5-129; *Thomas Bates & Son Ltd v. Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, 41 P & CR 345. The *Chartbrook* approach bypasses these established principles.

[41] *Spry – Equitable Remedies supra* at 635 note 6 curtly commented that "Lord Hoffmann treated rectification as depending on legal rules about the construction of contracts, where an objective test is applied ... [whereas] if in a particular case it appeared that both parties intended that a contract should make a particular provision, but it did not do so, on equitable principles rectification would be ordered regardless of whether objective evidence existed to support this contention".

[42] *Chitty on Contracts,* 31st edn, at 554 submitted:

> ... the 'objective approach to what the terms of the prior consensus test were' must be treated with caution. Lord Hoffman's *dictum* appears to look only at the evidence of the prior agreement in a purely objective way, from the view point of the 'reasonable fly on the wall'. The test normally used in English contract law to determine a party (A's) intention is not wholly objective in this sense. First, as submitted earlier, if the parties were in fact in subjective agreement as to the meaning of their words, their subjective intentions should govern. Secondly, if there is no subjective agreement, the question is how the other party (B) understood A's words and whether B's interpretation was reasonable. This should apply to the prior agreement. Thus if B understood words of the prior agreement according to normal meaning of the words and neither knew nor had reason to know that A intended something different, B can indeed take the words at face value. On these facts, if the written

agreement differs from the prior agreement (as in the *Chartbrook* case, where for the purposes of discussing rectification the agreement was assumed to provide from the payment of super overage as intended by *Chartbrook*), on Lord Hoffman's approach, B is *prima facie* entitled to rectification. If however, B knew A's prior intention to be different from the normal meaning of the words of the prior agreement, B cannot hold A to that meaning and the written agreement provides what A had intended, B should not be entitled to rectification, even if the result is that B is bound by a contract that he did not intend to make. It is arguable that the same is true if B did not have actual knowledge of A's intention, but B should have known that it was different to the ordinary meaning of the words used in the prior agreement. B does not have a reasonable belief that A intended what he appeared to say. Although the authorities are not conclusive, the result at common law may be either that there is no contract or that there is one on the terms which A intended and B should reasonably have understood to be intended. It would therefore be wrong to rectify the written agreement to bring it into line with the 'purely objective' meaning of the prior agreement. Lord Hoffmann does not discuss either of these scenarios in his speech in *Chartbrook* and the outcomes suggested do not seem consistent with his general approach. The aim of rectification should be to ensure the written agreement reflects the true bargain between the parties as determined by ordinary principle of contract formation.

[43] *Snell's Equity* 32nd edn. at 16-015 acknowledged that the objective test of intention was doubted:

> The requirement that the parties' actual intention be determined is appropriate; the court may rectify a written instrument only if it fails to reflect the actual intention of the parties. This seems preferable to an objective test of intention; after all, the best evidence of what the parties objectively agreed is to be found in the written document itself. It is difficult to justify why any prior objective agreement should override a later, formal, instrument unless the prior agreement reflects the parties' actual agreement and continued to do so at the time the instrument was executed. However, this approach has recently been doubted, and it has been strongly suggested that an objective approach to ascertaining the common intention of the parties is more appropriate, as this is consistent with the approach adopted in interpretation.
>
> Since the *Daventry* case was decided, Lord Toulson (as he now is) stated extra-judicially [TECBAR Annual Lecture, 31 October 2013, "Does Rectification require Rectifying?" at p 18] that 'in *Daventry* the majority made it clear … that we were not deciding that *Chartbrook* should be followed in other cases' and that, when a similar problem arises: 'it will be a matter for argument whether a court should follow the reasoning in *Britoil* or in *Chartbrook*. In principle a court should follow a binding decision of the Court of Appeal rather than a later opinion expressed obiter by the House of Lords'" (quoted from *Tartsinis v Navona Management Company*).

[44] It would seem that *Chartbrook* could even have been watered down by the Supreme Court.

[45] In *Marley v. Rawlings*, Lord Neuberger P, delivering the judgment of the court, observed that it was suggested by Sir Richard Buxton in *"Construction and Rectification after Chartbrook"* 69 [2010] Cambridge Law Journal 253 that Lord Hoffman's approach to interpretation in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 and *Chartbrook* at paras. 21-25, was inconsistent with previously established principles, and that it was suggested in "The Interpretation of Contracts Fifth Edition" at 9.03 that Sir Richard Buxton had made out "a powerful case for the conclusion that the difference between construction and rectification has been reduced almost to a vanishing point", and then said:

> 40. At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face ...

[46] And in *Arnold v. Britton* [2015] UKSC 36, Lord Neuberger P (with whom Lord Sumption and Lord Hughes agreed) remarked that the reliance placed in some cases, including *Chartbrook*, on commercial common sense and surrounding sense should not be invoked to undervalue the importance of the language of the provisions which is to be construed.

[47] *Chartbrook* was ignored in *Mohamed Bashir v. Mohammad Safraz Ali & anor* (2010) EWHC 2320 (Ch), where Elizabeth Jones QC said:

> 53. Mr Bredemear's case was that the parties shared a common intention, namely that only the shop and the first floor flat should be transferred. I was referred to *Joscelyne v. Nissen* [1970] 2 QB 86 and to *Chartbrook* at paragraph 60. However, in my view Mr Bredemear's case is fatally flawed. Here, of course, evidence of the parties' subjective intention and knowledge is central.

[48] However in *HFI Farnborough LLP and others v. Park Garage Group plc* [2012] EWHC 3577 (Ch), judge Behrens held that evidence of subjective intention is admissible under *Chartbrook* but the common intention of the parties must be judged objectively:

> It is now clear (at least below the Supreme Court) that the common intention of the parties must be judged objectively, in accordance with Lord Hoffman's *obiter dicta* in *Chartbrook v. Persimmon: Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333 at [78], [104]; [179]-[182]; [195]-[196]; *Scottish Widows v. BGC*, above, at [46].

> However, evidence of subjective intention is admissible, and may be significant where the prior consensus is based wholly or in part on oral exchanges or conduct. In such a case the subjective understanding of the parties throws light on what they are likely to have said to one another in objective communications "crossing the line": *Chartbrook v. Persimmon*, above, at [64]-[65]; *Daventry*, above, at [198].

[49] Sir Terence Etherton, Chancellor of the High Court of England and Wales, in "Contract Formation and the Fog of Rectification" dated April 2015, acknowledged that the speech of Lord Hoffmann in *Chartbrook* and the judgments of *Daventry* have not been universally accepted. That might be an understatement, for even in England, with the ebb and flow, it still remains to be seen if *Chartbrook* would ever be wholly accepted.

[50] In Australia and New Zealand, the position is *Crane v. Hegeman-Harris* and *Joscelyne v. Nissen*, minus "some outward expression of accord".

[51] In *Ryledar Pty Ltd v. Euphoric Pty Ltd* [2007] 69 NSWLR 603 at 655, Campbell JA (Mason P agreed) pronounced that parol evidence is receivable, in an action seeking rectification, to establish what was the intention of each of the parties to the contract, and that it may not be necessary to show that the accord found outward expression:

> ... Mr Rayment's submission that it is possible, for the purpose of deciding whether to grant rectification, to determine the common intention of the parties objectively, and ignore any inconsistent evidence which established that, subjectively speaking, no such common intention was held. That submission runs counter to fundamental principle about the basis on which rectification of contracts is granted.
>
> It is now clearly established that what is necessary for rectification of a document is a common intention of the parties that continues to the time of execution of the document in question, but that an antecedent concluded contract is not needed: *Slee v. Warke* (1949) 86 CLR 271 at 280-281 per Rich, Dixon and Williams JJ; *Maralinga Pty Ltd v. Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350 per Mason J; *Pukallus v. Cameron* (1982) 180 CLR 447 at 452 per Wilson J (with whom Gibbs CJ agreed), 456 per Brennan J; *Commissioner of Stamp Duties (NSW) v. Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 336 and 339 per Sheller JA (with whom Mahoney A-P and McLelland A-JA agreed). It is not sufficient to show that a written instrument does not represent the common intention of the parties - as well, it must be shown what their common intention was: *Slee v. Warke* (1949) 86 CLR 271 at 281.
>
> ...
>
> ... the type of intention that is relevant to rectification of a contract is the subjective intention - sometimes called the actual intention - of the parties.

In *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346 Mason J said:

> The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it - it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention (Emphasis added).

Parol Evidence Admissible

One way in which it can be seen that it is subjective intention that matters for rectification, concerns the evidence admissible in a rectification suit. Notwithstanding that the contract that it is sought to rectify is in writing, and notwithstanding the common law rule that parol evidence is not admissible to contradict a written agreement, parol evidence is receivable, in an action seeking rectification, to establish what was the intention of each of the parties to the contract: *Ball v. Storie* (1823) 1 Sim & St 210 at 219; 57 ER 84 at 88; *NSW Medical Defence Union Ltd v. Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740 at 751 and 752; *Farrow Mortgage Services Pty Ltd (in liq) v. Slade and Nelson* (1996) 38 NSWLR 636 at 642; *Commissioner of Stamp Duties (NSW) v. Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 332 per Mahoney A-P; *Brambles Holdings Ltd v. Bathurst City Council* (2001) 53 NSWLR 153 at 164, [27]; *Green v. AMP Life* [2005] NSWSC 370; (2005) 13 ANZ Ins Cas 90-124 at [172].

> It is also possible to have evidence from the drafts person of the document stating what his or her instructions were, and that particular words were included in the document by mistake: *Mortimer v. Shortall* (1842) 2 Dr & War 363 at 370 per Sir Edward Sugden.

Lord Hardwicke explained why parol evidence was admissible in this way in *Baker v. Paine* (1750)1 Ves Sen, 456 at 457; 27 ER 1140 at 1141: 'How can a mistake in an agreement, be proved but by parol evidence? It is not read to contradict the face of the agreement which the court would not allow, but to prove a mistake therein, which cannot otherwise be proved ...

Not only is parol evidence from the parties admissible to prove their intention, it is of considerable importance. In *Fowler v. Fowler* (1859) 4 De G & J 250 ; 45 ER 97 Lord Chelmsford LC said, at 273 of De G & J, 106-107 of ER:

> Upon the question of rectifying a deed, the denial of one of the parties, that it is contrary to his intention, ought to have considerable weight. Lord Thurlow, in *Irnham v. Child* (1 Bro C 93) says, "The difficulty of proving that there has been a mistake in a deed is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." And Lord Eldon, in *Marquis of Townshend v. Stangroom* (6 Ves 334), after observing that Lord Thurlow seems to say that the proof must satisfy the Court what was the concurrent intention of all the parties, adds, "And it must never be forgotten to what extent the Defendant, one of the parties, admits or denies the intention".

There is ongoing debate about whether it is necessary for there to be an "outward expression of accord" before rectification can be granted. That debate is noted (but not resolved - 'it may not be necessary to show that the accord found outward expression ...') in *Pukallus v. Cameron* (1982) 180 CLR 447 at 452 per Wilson J (with whom Gibbs CJ agreed).

...

Caution is needed in evaluating the case law relating to whether or not an outward expression of accord is needed. That is because it is not clear how much (or how little) is involved in an assertion, or denial, of the need for an "outward expression of accord". It is not clear just what the phrase means. One possibility is that the parties have said "we agree", or something similar, or performed an act like shaking hands or opening a bottle of champagne that is commonly recognised as an indication of a consensus having been reached. Another possibility is that each of the parties has in some fashion stated (though not to each other) his or her belief that an accord has been reached. Another is that the expression should be taken as performing the work that, in its context in *Joscelyne v. Nissen*, it was designed to perform, namely of indicating that identical subjective intentions, of parties involved in a contractual negotiation, to use a word with a meaning different to its actual meaning is not enough to give rise to rectification unless those subjective intentions of the negotiators have not only become known to each other, but as well they have in some way stated that they propose to use the word with a meaning different to its actual meaning. There is no point in multiplying examples.

In my view, when the fundamental requirement for granting rectification is a continuing common intention of the parties, it is of more assistance to concentrate on what is needed before an intention of the parties to a negotiation counts as a common intention. In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's

A intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can
B sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work - the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon,
C or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present purposes is that for a negotiating party to perform actions or say words from which the other party can gather his or her intention is itself a form of communication. Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract
D is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and
E conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since *Joscelyne*.

[52] In New Zealand, in *Dundee Farm Ltd v. Bambury Holdings Ltd* [1978] 1 NZLR 647, Richmond P, delivering the judgment of the court, applied
F *Crane v. Hegeman-Harris Co Inc* and *Joscelyne v. Nissen* without the requirement of 'some outward expression of accord'.

Before doing so we record the fact that there is no dispute between counsel as to the legal principles which govern this case. They are to be found in the judgment of Simonds J in *Crane v. Hegeman-Harris Co Inc*
G [1939] 1 All ER 662. A passage from that judgment was adopted as a correct statement of the law by the Court of Appeal in *Joscelyne v. Nissen* [1970] 2 QB 86, 95; [1970] 1 All ER 1213, 1220. The relevant portion is as follows:

... in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract
H between the parties antecedent to the agreement which it is sought to rectify ... [I]t is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal
I instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties ([1939] 1 All ER 662, 664).

[53] In *Westland Savings Bank v. Hancock* [1987] 2 NZLR 21, Tipping J followed *Dundee Farms Ltd v. Bambury Holdings Ltd* and expressly held that some outward expression of accord is not a requirement for rectification:

> That leads me to the question whether the common intention of the parties must be objectively demonstrated and whether there must be "some outward expression of accord": see per Russell LJ, delivering the judgment of the Court, in *Joscelyne v. Nissen* [1970] 2 QB 86 at p 98. The learned authors of *Equity: Doctrines and Remedies* by Meagher, Gummow and Lehane (2nd ed, 1984) at p 640 discuss the position in Australia and the question whether the intention of the parties must be communicated to each other and whether an outward expression of accord is necessary. They refer to various Australian cases and also to an article by Leonard Bromley QC entitled *"Rectification in Equity"* (1971) 87 LQR 532.
>
> Having considered these discussions and the cases I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the Court must be satisfied that the following points are established:
>
> (1) That, whether there is in antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
>
> (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.

I find support for that formulation in the words of Street J in *Australasian Performing Right Association Ltd v. Austarama Television Pty Ltd* [1972] 2 NSWLR 467, subsequently approved by Menzies J in the High Court of Australia in *Hooker Town Developments Pty Ltd v. Director of War Services Homes* (1973) 47 ALJR 320, 323-324. Street J said:

> It seems rather that the true principle involves finding an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other. On such facts there may be seen to exist objectively a consensual relationship between the parties ([1972] 2 NSWLR 467, 473).

[54] Singapore endorsed that there must be 'an outward expression of accord' in relation to the particular provision (*Marx Universal Development Group Pte Ltd v. Shen Yixuan* [2009] SGHC 164, *Pender Development Pte Ltd v. Chesney Real Estate Group LLP* [2009] 3 SLR (R) 1063). "What the Singapore cases have not dealt with is the opinion of Lord Hoffmann in *Chartbrook* to the effect that the test to ascertain the existence of a common intention is an objective one. It is submitted that this may be an acceptable approach to take, save that the courts may also have to reconcile this approach with Lord Hoffman's third principle in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, which has been accepted as correct by not a few Singaporean decisions. These include the important Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029" (*The Law of Contract in Singapore* by Andrew Phang Boon Leong at 10.261).

[55] Local cases have yet to pronounce on 'some outward expression of accord' or the so-called 'objective test' to ascertain the actual or real intention of parties. But given that *Crane v. Hegeman-Harris*, *Rose v. Pim*, and or *Joscelyne v. Nissen* were accepted in *Oh Hiam & Ors v. Tham Kong* [1966] 1 LNS 121; [1967] 1 MLJ 65, *Tham Kong v. Oh Hiam & Ors* [1967] 1 LNS 193; [1968] 1 MLJ 44, and *Juson Bien*, it would follow that a plaintiff must show an antecedent agreement or a continuing common intention with 'some outward expression of accord'.

[56] Forceful views were expressed that the requirement of 'some outward expression of accord' has no basis in equity. For the moment, let it be accepted that the requirement of 'some outward expression of accord' is contrary to equitable principle. But is that reason enough to dispense altogether with the 'outward expression of accord'? Of course, with an antecedent agreement, the 'outward expression of accord' might not be needed at all to prove the continuing common intention. But without an antecedent agreement, the 'outward expression of accord' should naturally assume importance, be it to establish or disprove the continuing common intention. *Chitty on Contracts* 30th edn. vol. I at 5-114, submitted that "some outward manifestation is required for there to be an agreement". Likewise, some outward manifestation is required for there to be continuing common intention. For that reason, we agree that *Joscelyne v. Nissen* did not add any additional requirement for the rectification of an instrument but merely qualified Simonds J's statement of law by asserting that the continuing common intention must be made manifest by 'some outward expression of accord'. That qualification of Russell LJ to Simonds J's statement of law did not lay down a substantive requirement. At most, Russell LJ merely pointed out, rightly so, that the continuing common intention must be made manifest by 'some outward expression of accord'. If 'some outward expression of

accord' is not evidentially required, how then could it be shown that the instrument does not truly express or accord with the continuing common intention? Without 'some outward expression of accord', how could any alleged mistake between the continuing common intention and the instrument be established? In our considered opinion, the rectification of an instrument should not be wholly dependent on the subjective word of the parties, which, in spite of all said for it, is far less dependable than 'outward expression of accord'. We share the view that "the certainty of transactions would be undermined if the court could act, otherwise than in exceptional circumstances, simply on the assertion of a party to the transaction". As said, where there is an antecedent agreement, the 'outward expression of accord' may not be that important. But where there is no antecedent agreement, there must then be evidence of 'some outward expression of accord' to prove the continuing common intention. Russell LJ merely voiced the self-evident truth that the continuing common intention must be evidenced by 'some outward expression of accord'. As the 'outward expression of accord' goes to proof of continuing common intention, we wholly agree that the 'outward expression of accord' is an evidential factor. Since it is only an evidential factor, we do not think that 'some outward expression of accord' is contrary to both principle and authority.

[57] Before we hazard to consider whether the continuing common intention is an objective fact or the subjective belief of the parties, we must emphasise that attention must be had for the words of ss. 30-32 of the Act. Words and phrases in authorities cannot displace the words of the Act. Under s. 30 of the Act, it is mutual mistake and not common mistake. "The distinction between the epithets 'common' and 'mutual', though surprisingly often confused both in and out of the reports, is clearly stated in the *Oxford English Dictionary*. 'Common' is there defined as 'possessed or shared alike by both or all the persons or things in question'. 'Mutual' was, indeed, at one period used as a synonym for 'common'; but according to the OED, this is 'now regarded as incorrect' and properly means 'possessed or entertained by each of two persons towards or with regard to the other'. See the more caustic words of Fowler in *Modern English Usage* under 'mutual'" (*Cheshire, Fifoot & Furmston's Law of Contract supra* at 294 note 6; that distinction was made in *Tham Kong v. Oh Hiam & Ors* [1967] 1 LNS 193; [1968] 1 MLJ 44, per Barakbah LP).

[58] Under the Act, the only epithet is 'mutual mistake', where parties misunderstand each other and are at cross-purposes. The Act is silent on unilateral mistake. That is because "traditionally, there can be no rectification for a unilateral mistake" (*Snell's Equity* 32nd edn. at 16-018). "To this rule there are at least three possible exceptions or qualifications. The first is in cases of fraud; for 'fraud unravels everything': *May v. Platt* [1900] 1 Ch 618 at 623 per Farwell J. The second lies in the doctrine of

Romilly MR to be found in the much-discussed line of cases beginning with *Garrard v. Frankel* (1862) 30 Beav 445, in which the court, suspecting dishonesty and yet hesitating to find fraud, has put the defendant to his election of either accepting rectification or else submitting to rescission. These cases have been said to be supportable only as based on fraud (*May v. Platt, supra*), and if this is right, they do not form a separate category. The third possible exception or qualification is that which arose in *A Roberts & Co, Ltd v. Leicestershire County Council* [1961] 2 WLR 1000 ..." (*Law Q Rev* vol. 77 at 313-314). "Historically, rectification for unilateral mistake was permitted only in cases where fraud could be established ... more recently, the basis on which rectification will be ordered for unilateral mistake has widened beyond cases of fraud" (*Snell's Equity* 32nd edn. at 16-019) to unconscionable conduct. "Where only one party makes a mistake in the recording of a contract, the relevant document may be rectified if, in addition, the non-mistaken party was guilty of fraud, or misrepresentation, or the requirements for an estoppel have been met. Rectification will also be ordered if the non-mistaken party knew of the mistake. For these purposes, knowledge refers not only to actual knowledge, but also includes wilfully shutting one's eyes to an obvious mistake, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make" (*Treitel, The Law of Contract* 13th edn. at 8-067). In *Thomas Bates & Son Ltd v. Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, Buckley LJ set out the following requirements for rectification on the ground of unilateral mistake: (1) first, that one party, A, erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a term or provision which, mistakenly, it did contain; (2) second, that the other party, B, was aware of the omission or the inclusion and that it was due to a mistake on the part of A; (3) third, that B has omitted to draw the mistake to the notice of A; (4) the mistake must be one calculated to benefit B, which were accepted as authoritative in *Littman v. Aspen Oil* [2005] EWCA Civ 1579. In *Commission for the New Towns v. Cooper (Great Britain) Ltd* [1995] Ch 259, the Court of Appeal suggested that knowledge that the claimant was acting under a mistake would extend to certain categories of imputed knowledge and that there might be other examples of sufficiently unconscionable conduct. Given the case law, it is evident that s. 30, which provides for fraud as a ground for rectification of the instrument, and s. 31, which provides "the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement", were expressly designed to accommodate exceptions to the general rule. A unilateral mistake within the exceptions suffices for rectification of the instrument.

[59] Pursuant to s. 30 of the Act, the court must ascertain "the real intention of the parties in executing the (instrument)". Only if the instrument "does not truly express their intention", may a party institute a suit to have the instrument rectified. The Act does not say that a plaintiff must show a

binding antecedent agreement. In every respect, s. 30 of the Act is a reflection of the following statement of Simonds J in *Crane v. Hegeman-Harris Co Inc*:

> Before I consider the facts and come to a conclusion whether the Defendants are right in their contention, it is necessary to say a few words upon the principles which must guide me in this matter. I am clear that I must follow the decision of Clauson J, as he then was, in *Shipley Urban District Council v. Bradford Corpn*, *the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify*. The judge held, and I respectfully concur with his reasoning and his conclusion, *that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify*, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, *it would be a strange thing, for the result would be that two parties binding themselves by mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it*. That is a state of affairs which I hold is not the law, and, until a higher court tells me that it is the law, I shall continue to exercise the jurisdiction which Clauson J, as I think rightly, held might be entertained by this court. (emphasis added)

[60] And pertinent to 'real intention', case law clearly held that the subjective intentions of parties are relevant. To begin with, in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, it was clearly stated, in Lord Hoffmann's third principle of construction, that declarations of subjective intent are admissible in an action for rectification.

[61] In *Cambridge Antibody Technology Ltd v. Abbott Biotechnology Ltd and anothe*r [2004] EWHC 2974, Laddie J put up a powerful argument, which we see it fit to reproduce *in extenso*, that case law and even Lord Hoffmann's third principle of construction supported the view that the intention of the parties and evidence of it are relevant:

> It seems to me that central to this is the need to show what the parties intended at the relevant time. Because the law, as it stands at present, also requires an outward manifestation of the common intent, the intentions of the parties separately and together are not sufficient to secure relief. But, as Snell shows, the intention of the parties and evidence of it, is clearly relevant. This is supported by much authority. I will only refer to a few. First, it is worth remembering what was said by Lord Hoffmann in the *Investors' Compensation Scheme* case (*supra*):

> The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them. (emphasis added)

Central to this passage is the distinction drawn between the common law approach to construction and the equitable doctrine of rectification. In the former one does not look at the subjective intent of the parties, in the latter one does. Similarly in *BCCI v. Ali* [2002] 1 A.C. 251, Lord Nicholls said:

> This judgment in the High Court of Australia in *Grant*'s case contained also the observation that the surrounding circumstances to be taken into account include the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and "the actual intention of the releasor". For many years the accepted wisdom has been that evidence of the actual intention of the parties is not admissible on the interpretation of a written agreement, although such evidence is admissible for other purposes, for example, on a claim for rectification. In *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 913, my noble and learned friend Lord Hoffmann pointed out that the exclusion from evidence of the previous negotiations of the parties and their declarations of subjective intent is for reasons of practical policy. He added that the boundaries of this exception are in some respects unclear. (paragraph 31, emphasis added)

The same point is made in *Joscelyne v. Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, a case relied on by Lord Grabiner in support of his proposition. There the Court of Appeal cited with approval its previous decision, *Lovell and Christmas Ltd v. Wall* 104 LT 85 and, in particular, the following passage from the judgment of Buckley LJ:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain. (emphasis added)

Once again, this emphasises the need to show the parties' intentions outside the terms of the written instruments although those intentions, without more, are not enough to justify rectification. The Court of Appeal also referred with approval to the judgment of Simonds J in *Crane v. Hegeman-Harris Co Inc.* [1939] 1 All ER 662, [1971] 1 WLR 1390. Among the passages cited was the following:

> The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I shall continue to exercise the jurisdiction which Clauson J., as I think rightly, held might be entertained by this court.
>
> The whole thrust of that passage is to distinguish the objectively assessed meaning of the words used in an instrument from the "real intention" of the parties. Rectification is relief intended in defined circumstances to give effect to the "real intention" when it differs from objective construction. It seems to me that it is impossible to determine what the real intent of the parties is without admitting evidence of what they intended" (Emphasis added).

[62] In *Cameron v. M & W Mack (ESOP) Trustee Ltd* [2001] All ER (D) 112 (Nov), J Gaunt QC (sitting as a Deputy Judge of the Chancery Division) cited the following passage from the judgment of Lord Wright in *Inland Revenue Commissioners v. Raphael* [1935] AC 96, to show that the objective standard of construction which excludes evidence of actual intention does not apply in rectification:

> It must be remembered at the outset that the Court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word 'intention' in cases of this character. The word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them: such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonise as far as possible all the parts: particular words may appear to have been used in a special sense, which may be a

technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be affected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention: these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or rewrite the clauses in order to give effect to the real intention. But that is not construction, but rectification. (Emphasis added)

[63] Clearly, therefore, to ascertain the real intention of the parties, the subjective intention and evidence of it is relevant in rectification. To ascertain the real intention, the court adopts, as it must, the objective approach to evaluate all evidence, including evidence of the actual state of mind. But being relevant does not mean that the subjective intention prevails over intercommunication or that which crossed the line.

[64] To sum up, for rectification of an instrument, the plaintiff must show that the instrument sought to be rectified does not truly express the real intention of the parties. In other words, the plaintiff must show that the instrument sought to be rectified does not truly express the antecedent agreement or continuing common intention up to the point of execution of the formal instrument. Evidence of what took place prior to execution of the instrument is admissible and indeed essential to prove what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain. "... it is possible to adduce evidence of each of the parties" intention to show that they had a common intention and it is also possible to use both pre- and post-contractual statement from which can be inferred the requisite common intention" (*Cheshire & Fifoot Law of Contract* 10th Australian edn. at 12.33). 'Some outward expression of accord' is evidence of 'continuing common intention'. Evidence of subjective intention is relevant to ascertain the real intention of the parties. In short, the position in Malaysia is *Crane v. Hegeman-Harris* and *Joscelyne v. Nissen*, but with the 'some outward expression of accord' being an evidential factor. If the court finds it clearly proved that there has been fraud or mutual mistake in framing the instrument, and has ascertained the real intention of the parties in executing the instrument, "the court may in its discretion rectify the instrument so as to express that [real] intention, so far as this can be done without prejudice to the rights acquired by third parties in good faith and for value". In rectifying an instrument, the court is not confined to an enquiry on the construction of the instrument.

[65] What would have been the real intention of the parties in the instant case? In paras. 7, 8 and 16 of the statement of claim, the appellant pleaded:

> 7. ... "pursuant to the provisions of the GSA and SPA respectively the [Respondent] expressly agreed to transfer and convey the said land free of encumbrances whatsoever to the Plaintiff. The said land was valued in the sum of RM18,000,000.00 in the GSA ("the Agreed Valuation") which sum was to be factored out of the Settlement Sum. In turn, the SPA recognised the provisions of the GSA by providing that the Agreed Valuation would constitute the purchase price for the said Land which is deemed settled and satisfied by the Plaintiff pursuant to Clause 2 of the GSA.
>
> 8. ... the GSA primarily embodied the true intent of the parties in that there would be no actual payment of monies by the Talam-Group to the [Appellant] and that the transfer and conveyance of the said Land to the [Appellant] would constitute partial payment of the Settlement Sum. Notwithstanding the stated intent of the parties, the SPA which was executed by the Plaintiff and the Defendant in the belief that it properly reflected the agreement as provided for in the GSA, did not in fact embody the same. In particular, by Clause 2.2 of the SPA, the Plaintiff is required to pay, satisfy and redeem the said Land for RM7m or thereabouts from Danaharta and MBB ("Clause 2.2 of the SPA"). In the result the SPA was drawn up and executed by the [Appellant and Respondent] with the inclusion of a Clause 2.2 under a mutual mistake of fact, particulars of which are as follows ...
>
> 16. ... In the premises, the [Appellant] contends and will contend that Clause 2.2 of the SPA was included pursuant to a mutual mistake and that the SPA ought to be rectified to exclude the same as the Plaintiff cannot be compensated otherwise than by an order for rectification. To-date, the SPA has not been altered, added to, varied or terminated.

[66] *Inter alia*, the appellant sought an order to remove cl. 2.2 and an order for specific performance of the GSA.

[67] The only witness for the appellant was one Tan Choon Hock (PW1), a director and substantial shareholder of the appellant, who affirmed in his witness statement (121-137AR) as follows. Between 1997 and 2004, the plaintiff executed works for the Talam Group. At the end of 2004, the Talam Group owed a sum of RM57,425,697.82 to the appellant. The appellant and the Talam Group negotiated a settlement, and entered into a settlement agreement, namely the GSA, on 29 February 2005. He executed the GSA and all other agreements at the office of Messrs Yeap & Yong, who were the solicitors for the respondent. Mr Yong Wooi Hon of Messrs Yeap & Yong just said that the GSA reflected the understanding reached between the parties. Prior to the GSA, the parties had pre-contractual discussions and negotiations, where he represented the appellant while Tan Sri Dato' Chan Ah Chye and Puan Sri Datin Thong Nyok Choo represented the Talam

A Group. The appellant was not represented by solicitors. At those discussions and negotiations, it was agreed that the total debt would be RM56m instead of RM57,425,697.82, and that the appellant would accept cash and properties. It was agreed that RM36m would be paid by the transfer of properties. It was agreed that the properties would be free of encumbrances,
B and sub-divided into individual lots with individual titles. It was agreed that the Saujana Puchong land [Lots 50608 & 50609] and the Lestari Puchong land [Lot 50603] were each worth RM18m. The GSA reflected what had been agreed and intended by the parties. Clauses 2.1.1, 2.2.1, and 2.3.1 of the GSA reflected that the properties were to be transferred free of
C encumbrances. According to the GSA, no monies were payable by the appellant for any of the properties including Lot 50603, except for the stamp duty, legal fee for the transfer and outgoings. The GSA provided that the cost and expense of sub-division would be borne by the Talam Group. Clauses 2.1, 2.2, and 2.3 of the GSA reflected that. Other documents, including the
D SPA, development agreement, and power of attorney, were executed to effectuate the GSA. Except for cl. 2.2, cls. 1.1, 2.1, 3, 6.1, 6.2, 7, and 9 of the SPA reflected the intention of the parties to convey Lot 50603 to the appellant free of encumbrances. Clause 2.2 of the SPA, which provided for the appellant to redeem Lot 50603 from Danaharta and MBB, did not comply with the GSA. The appellant was not told that Lot 50603 was
E charged. He executed the SPA in the belief that it accurately reflected the GSA. Mr Yong Wooi Hon had assured him that the GSA governed the entire transaction between that parties. He would not have signed the SPA had he known of the effect of cl. 2.2. He would not have agreed to pay another RM7m for Lot 50603. Clauses 6, 6.12, and 6.16 of the SPA and cl. 2.3 of
F the GSA reflected that it was represented to the appellant that Lot 50603 was free of encumbrances. The GSA was the main agreement, as all other documents were executed on the basis of the GSA, which was recognised in cl. 7 of the SPA. The said RM20m had not been paid as promised. The appellant had no problem with the other two lots. The first time he realised
G that there was a problem with cl. 2.2 was when he received the demand of the respondent dated 22 August 2007 to redeem the Puchong Lestari land from Danaharta. The MBB charge was discharged on 21 June 2007. The appellant did not redeem the MBB charge. It must have been redeemed by the respondent. Clause 2.2 was a mistake, as the settlement did not require
H the appellant to make any payment of money.

[68] Under cross-examination (106-113AR), PW1 testified as follows. He was given an advance copy of the SPA. He did not ask for time to read the SPA before he signed it. To save cost, he did not appoint lawyers. He had no option but to contra the outstanding account. He denied that he accepted
I Lot 50603 because of its development permit, and or that he agreed to pay the redemption sum because of the development potential of Lot 50603. He

wanted "the 56 million and not the land". Mistake was not an afterthought. It was the responsibility of the respondent to transfer Lot 50603 free of encumbrances.

[69] The respondent's senior vice-president for project and marketing, Tan Bak Hai (DW1), was the only witness for the respondent, who affirmed in his witness statement (138-143AR) as follows. On 29 July 2005, the parties entered into the GSA "to set-off the amount owing by the (Talam Group) ... At the same time, the parties entered into the SPA". The appellant failed to redeem Lot 50603 in accordance with cl. 2.2. The appellant was informed that Lot 50603 was under charge. "The (appellant) asked the (respondent) to waive the requirement for payment of the redemption sum ... the (respondent) did not agree because the land was worth more than RM18m. After a few meetings, the (appellant) agreed to pay the redemption sum". Clause 2.2 was not a mistake, as recital B stated that the land was subject to charge. The amount of debt to be set off was RM18m. The land was worth RM25.8m. "That was why the (appellant) was required to pay the redemption sum because the (appellant) could not be unjustly enriched ..." There was no conflict between the GSA and the SPA. The purpose of the GSA was to fix the settlement sum of RM18m while the purpose of the SPA was to spell out the detailed mechanics of the transfer and set-off. Payment of the redemption sum reflected the value of the land and the GSA.

[70] Under cross-examination (113-120AR), DW1 testified as follows. Apart from the SPA, there were no documents that showed that the appellant had been informed of the land charges. The MBB charge was settled in 2007 by the buyers of the housing units. The SPA was entered into pursuant to the GSA. The GSA did not say that the appellant should discharge the encumbrances. Clauses 6.12, 6.2, and 7 of the SPA and cl. 2.3 of the GSA stated that Lot 50603 was free of encumbrances. Clause 9 of the SPA was the respondent's undertaking to deliver the said land free of encumbrances. Lot 50603 was not valued in 2005, but in 2011 at RM25m, based on commercial value. In 2005, the said land was agricultural land. The GSA provided for a global settlement sum of RM56m, but that sum would be reduced to RM49m if the appellant were to redeem the said land.

[71] The appellant claimed that cl. 2.2 was a mistake, in that it did not reflect the GSA. The respondent refuted that cl. 2.2 was a mistake and or that the GSA was the antecedent agreement. But if the GSA was not the antecedent agreement, then what was it? Could the SPAs and other agreements come into being without the GSA? What would have been the real intention of the parties up to the point of execution of the SPA? But alas, those questions were not asked, or, if asked, were not answered by the courts below who never went beyond the construction of cl. 2.2 to the domain of rectification. In fact, the trial court merely read cl. 2.2 in isolation and not

in the context of the SPA and its other clauses. The trial court cited *Yuson Bien & Anor v. Bankers Trust Co Ltd* per Ajaib J. At paras. 5.12 - 5.14 of its grounds, the trial court also made the right statements of law on the construction of documents. But even so, the trial court still went about it by a construction of cl. 2.2. There was no comparison of cl. 2.2 with the real intention of the parties. The trial court merely read clause 2.2, accepted the evidence of DW1 that cl. 2.2 was not wrongly inserted, and then held that cl. 2.2 prevailed over all clauses of all documents. With respect, the Court of Appeal fared no better, as it also approached the sought rectification by a construction of cl. 2.2 and not by an enquiry on the real intention of the parties at the time of execution of the SPA. The following para. 15.2 of its grounds typified the approach of the Court of Appeal:

> We agreed with the learned judge when she made specific reference to the recital of the SPA3, that is recital (B) which states:
>
> > The Project Land is charged to Danaharta and MBB at the ratio of 60:40.
>
> and clause 2.2 of the SPA3 to conclude that these provisions were clearly complementary to each other and consistent with the parties' understanding *vis* the effect of clause 2.2. Further recital (B) was followed by recital (F) to show that the SPA3 was executed to effectuate the parties' intention pursuant to the GSA. Recital (F) states:
>
> > Simultaneous with the execution of the Agreement, the parties herein together with all such other parties identified/defined/referred to as TALAM-GROUP and the CONTRACTOR are entering into a global settlement agreement amongst themselves [the Global Settlement Agreement] for settlement of the indebtedness by the TALAM-GROUP to the CONTRCTOR upon the terms and conditions therein contained (words, terms and phrases herein contained being defined in the Global Settlement Agreement).
>
> That being the case, we did not see how it could be said that there was a mistake to include clause 2.2 in the SPA3. In fact it was essential to include clause 2.2 in order to enable the defendant to fulfil its other obligations to surrender the Puchong Lestari land to the Plaintiff. Clause 2.2 provided specifically that it was the Plaintiff, as purchaser, to settle, satisfy and redeem the Puchong Lestari land at RM7m to Danaharta and MBB at the ratio of 60:40; it therefore followed that any other clauses, such as clause 6.2, 6.12, 6.16 of the SPAs which are contradictory to clause 2.2 must necessarily be subject to clause 2.2.

[72] The core reasoning of the courts below was that cl. 2.2 was not a mistake, as it was clear, unambiguous, and consistent with the recital (B) of the SPA. That, with respect, was construction and not the modus of rectification. But even on construction of cl. 2.2, the courts below were wide off the mark. Recital (B) was a recital which merely set the scene. Recital (B)

was not an operative part of the SPA. To conclude that recital (B) and cl. 2.2 were provisions "clearly complementary to each other", which put recitals and provisions on par, was a serious misdirection. Another serious misdirection in the construction of cl. 2.2 was to prefer recital (B) over cls. 6.2, 6.12, and 6.16 of the SPA, whereas it has long been established that a clear provision is to be preferred over a recital (see *Ex Parte Dawes, In re Moon* (1886) 17 QBD 275 at 286 per Lord Esher, and cited with approval in *Yap Phooi Yin & Anor v. CM Boyd*).

[73] But the most misdirection by the courts below in the construction of cl. 2.2 was to ignore and give no effect to the other provisions of the SPA. There was a conflict between cl. 2.2 which provided for the appellant to redeem Lot 50603, and cls. 6.2, 6.12, 6.16, and 9 which provided that Lot 50603 was "of leasehold tenure and free of all claims, liens, charges, mortgages, equities, restrictions-in-interest and any other encumbrances whatsoever". But all latter clauses were equally clear and unambiguous. Therefore, being clear and unambiguous was no good reason to prefer cl. 2.2 over cls. 6.2, 6.12, and 6.16. The courts below resorted to recital (B) to resolve the conflict. But with respect to the courts below, recital (B) was neutral and it was not repugnant to cls. 6.2, 6.12, and 6.16. Recital (B) and cls. 6.2, 6.12, and 6.16 were equally "complementary". Recital (B) was not the key to the solution. The key was cl. 7 of the SPA which provided that "the vendor hereby agrees to sell and the purchaser agrees to purchase the property on the basis of cl. 2.3 of the GSA". Accordingly, the SPA must be read in conjunction with the GSA. Clause 2.3.1 of the GSA clearly provided that the respondent shall "effect the conveyance and transfer" the said land "free from encumbrances whatsoever ... without any payment whatsoever to made by the (appellant)". Reasonably, when construed together, the purport and effect of the GSA and SPA could not be any clearer. The said Lot 50603 to be transferred should be free of all encumbrances. Consequently, we could not support the construction of the courts below. There is another reason why the construction by the courts below could not be supported. If cl. 2.2 were not a mistake, then the appellant should only pay 60% and not 100% of the redemption of RM7m.

[74] Also, we could not support the result of the courts below from the rectification standpoint. It was the finding of the Court of Appeal, which was correct, that the SPA was to effectuate the GSA. Therefore, the SPA was not a stand-alone agreement. It was there to effectuate the GSA. Hence, the GSA was the antecedent agreement. But even if the GSA were not the antecedent agreement, it was still the indisputable "outward expression of accord" of the continuing common intention between the parties at the point when the parties executed the SPA. In either case, be it antecedent agreement or continuing common intention evinced by "outward expression of accord", it

would still have been the intention of the parties, at the point in time when they executed the SPA, to effectuate the GSA, which sole purpose was to settle the outstanding debt of RM56m. That was the bottom line of the entire accord between the parties. The real intention of the parties was to settle the debt of RM56m. Even DW1 agreed that that was the real intention of the parties. That the debt was to be settled by a cash payment and by the transfer of three properties was the term on the mode of payment of that RM56m. The mode of payment should settle the debt of RM56m. But if the appellant had to redeem the Danaharta charge by payment of RM7m to Danaharta, that would mean that the appellant would surely not be paid the full debt of RM56m, which would not be in accord with the antecedent agreement or the continuing common intention of the parties when they executed the SPA. Therefore, cl. 2.2 could not have expressed the real intention of the parties. Clause 2.2 was clearly a mistake.

[75] Lack of care on the part of the plaintiff is no bar to rectification (*Weeds v. Blaney*). As for the argument that mistake was only raised after two years had passed from the date of execution of the SPA, we do not see how that fact could influence the result. On 22 August 2007, the respondent demanded the redemption of Lot 50603. Almost immediately, on 4 September 2007, the appellant replied that cl. 2.2 was a mistake. And on 20 October 2008, the appellant filed suit to have the SPA rectified. Clearly, therefore, the appellant had moved with all due expedition when it became aware of the departure between the SPA and the GSA, such that there was no delay upon which reliance could be placed in connection with any defence of laches (see *Australasian Performing Right Association Ltd v. Austrama Television Pty Ltd* [1972] 2 NSWLR 467).

[76] We now answer the leave questions in the following terms. When a written agreement is sought to be rectified, the court adopts the objective approach to ascertain the real intention of the parties. An antecedent agreement is the best evidence of the real intention of the parties. The continuing common intention is the next best evidence of the real intention of the parties. For rectification of an instrument, the plaintiff must show that the instrument sought to be rectified does not truly express the real intention of the parties. The plaintiff must show that the instrument sought to be rectified does not truly express the antecedent agreement or continuing common intention up to the point of execution of the formal instrument. There can be no rectification, only construction then, if the plaintiff cannot show the real intention of the parties. Evidence of what took place prior to execution of the instrument is admissible and indeed essential to prove what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain. "Some outward expression of accord" is evidence of "continuing common intention". Evidence of subjective intention is relevant to ascertain the real

intention of the parties. But the subjective intention as well as a subjective denial must be evaluated under the light of the intercommunication or that which had "crossed the line". If the court finds it clearly proved that there has been fraud or mutual mistake in framing the instrument, and has ascertained the real intention of the parties in executing the instrument, "the court may in its discretion rectify the instrument so as to express that (real) intention, so far as this can be done without prejudice to the rights acquired by third parties in good faith and for value".

[77] In rectifying an instrument, the court is not confined to an enquiry on the construction of the instrument. In the instant case, on both construction and rectification, the appellant should succeed. In the premises of the aforesaid, we unanimously allow this appeal with costs to the appellant. In the corollary, we rectify the pertinent SPA by erasing cl. 2.2 from the SPA, set aside the orders of the courts below, and order the respondent to specifically transfer the said land to the appellant free of encumbrances within 30 days of this order.